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No. 22237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. BRYANT KASEY and MARYANN KASEY,
Appellants,

vs.

MOLYBDENUM CORPORATION OF AMERICA, a corporation,
Appellee.

Appeal From the United States District Court for the Central District of California.

BRIEF OF APPELLEE.

SCHULTHEIS, LAYBOURNE & DOWDS,
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No. 22237

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

J. BRYANT KASEY and MARYANN KASEY,

Appellants,

vs.

MOLYBDENUM CORPORATION OF AMERICA, a corporation,

Appellee.

Appeal From the United States District Court for the Central District of California.

BRIEF OF APPELLEE.

Statement of the Case.

By order dated February 2, 1967, Honorable Jessie W. Curtis, Judge of the United States District Court for the Central District of California, denied appellants' motion to change the venue of their action to the United States District Court in Nevada. [R. pp. 13-14.]

Such motion was filed nearly eight years after the action had been initiated. During that time there had been two appeals, one attempted appeal and two petitions to this Court, and a number of issues had been separately tried and adjudicated pursuant to Rule 54(b). A few issues are still remaining for trial.

(b) is not available in such case and that review must be effected by application for mandamus. *A. Olinck & Sons v. Dempster Bros., Inc.,* 365 F. 2d 439, 442 (2d Cir. 1966); *Standard v. Stoll Packing Corporation,* 315 F. 2d 626 (3d Cir. 1963); *Bufalino v. Kennedy,* 273 F. 2d 71 (6th Cir. 1959). The view of the Fifth Circuit is to the contrary. *Humble Oil & Refining Company v. Bell Marine Service, Inc.,* 321 F. 2d 53 (5th Cir. 1963).

2. As an Application for Mandamus, This Proceeding Must Fail for Want of Extraordinary Circumstances.

Even if there had been some abuse of discretion or other error in the order of the District Court, the drastic remedy of mandamus would not be warranted.

In *Gulf Research & Development Co. v. Harrison,* 185 F. 2d 457 (9th Cir. 1950); aff'd in 344 U.S. 861, 73 S. Ct. 103, 97 L. Ed. 668 (1952) this Court denied a petition for mandamus wherein the petitioner sought to prevent transfer of the case to a different district. In denying such petition, Judge Orr emphasized that only extraordinary circumstances would warrant such relief.

> "We are of the opinion that once a suitor has properly invoked federal jurisdiction in this circuit it is within our power, in extraordinary circumstances, to issue mandamus to prevent a grave miscarriage of justice." *Gulf Research & Development Co. v. Harrison, supra,* at page 459.
>
> "The remedy of appeal from a final judgment is 'inadequate' so as to justify the use of mandamus only when it is totally unavailable, or when, because of the particular circumstances, it could

not correct extraordinary hardship." *Gulf Research & Development Co. v. Harrison, supra,* at page 460.

Appellants have pointed to no circumstances which would justify the extraordinary remedy of mandamus. (See discussion on pages 9 and 14, *infra.*) Impatient as they may be for a review of the order of the District Court, appellants have been unable to advance any reason why they should be excused from the rule imposed upon other litigants, that review of an interlocutory order must await entry of final judgment.

* * * * *

Because this proceeding cannot be properly entertained by the Court of Appeals, either as an interlocutory appeal or an application for mandamus, such proceeding should be dismissed.

II.

EVEN IF THE ORDER DENYING CHANGE OF VENUE WERE TO BE REVIEWED BY THIS COURT, SUCH ORDER WAS FREE OF ERROR AND SHOULD BE AFFIRMED.

The statute upon which appellants predicated their motion is 28 U.S.C. Section 1404(a). (Appellants' Op. Br. p. 3, lines 2-4.) Such section provides:

> "(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Denial of the motion was based primarily upon the ground that the statute does not authorize a change of venue in this particular case. Because it goes to the heart of the matter, this point will receive appellee's first attention herein.

1. Since This Action Could Not Have Been Brought Initially in the District of Nevada, It May Not Be Properly Transferred to That District.

A District Court may transfer a civil action only to a ". . . district or division *where it might have been brought.*" 28 U.S.C. 1404(a). (Emphasis supplied.)

In denying appellants' motion for a change of venue, the District Court stated as its first ground for such decision:

> "1. It does not appear that this action could have been instituted in the District of Nevada;" [R. p. 13, lines 26-27.]

(a) Recovery of Possession of Real Property Situated in California Is One of the Claims Asserted in This Action.

One of plaintiffs' causes of action seeks recovery of title to and possession of certain mining claims near Mountain Pass, County of San Bernardino, California. [R. p. 4, lines 6-7, 25-26.] Such issue was duly tried and pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, on March 13, 1963, it was adjudicated that recovery of such claims was barred by California Code of Civil Procedure Section 318. Upon appeal from such judgment, the same was affirmed by this Court in *Kasey v. Molybdenum Corporation of America,* 336 F. 2d 560 (9th Cir. 1964).

The mining claims which appellants sought to recover in the instant action were found by the District Court to be real property. Such determination was confirmed by this Court, which stated in its opinion:

> ". . . we hold that the district court was not in error in assuming that the mining claims, mill-

sites, and appurtenances and improvements thereto are real property within the meaning of Sections 318 and 17 of the California Code of Civil Procedure." *Kasey v. Molybdenum Corporation of America, supra,* at page 565.

Accordingly, there is no question that one purpose of the present action concerned recovery of title to and possession of real property and that such property is located in California.

(b) An Action to Recover Possession of California Real Property Must Be Brought in California.

A local or *in rem* action in the Federal Court, predicated as in this case upon diversity of citizenship, must be brought in the district where the property is located. Such a requirement has been held to be not merely a question of venue but one which goes to the very jurisdiction of the court. *Livingston v. Jefferson,* 15 Fed. Cas. 660, No. 8411 (C.C.D. Va. 1811); *Ellenwood v. Marietta Chair Co.,* 158 U.S. 105, 15 S. Ct. 711, 39 L. Ed. 913 (1895); *Pasos v. Pan American Airways, Inc.,* 229 F. 2d 271 (2d Cir. 1956).

The Supreme Court has stated the rule most succinctly:

> ". . . an action for trespass upon land, like an action to recover the title or possession of the land itself, is a local action, and can only be brought within the state in which the land lies." *Ellenwood v. Marietta Chair Co., supra,* 158 U.S. 105 at page 107.

The preliminary question of whether an action is local or transitory is determined by state law. *Josevig-Kennecott Copper Co. v. James F. Howarth Co.,* 261

Fed. 567, 569 (9th Cir. 1919); *Erwin v. Barrow,* 217 F. 2d 522 (10th Cir. 1954).

In California an action to recover real property is local in nature and such fact *goes to the jurisdiction* of the state courts:

> "An absolute right is conferred by the Constitution, Article VI, section 5, which provides that all actions for the recovery of possession of, quieting title to, or for the enforcement of liens upon real estate, shall be 'commenced' in the county in which the real estate, or any part thereof, affected by such actions is situated." *Brock v. Superior Court,* 29 Cal. 2d 629, 633; 177 P. 2d 273 (1947).

A motion to transfer a local or *in rem* action to a district other than that in which the subject matter was located was held to have been properly denied in *Clinton Foods v. U.S.,* 188 F. 2d 289, 292 (4th Cir. 1951).

As the mining claims which appellants sought to recover are situated within the jurisdiction of the District Court for the Central District of California, it follows that selection of that particular forum was *mandatory as a matter of jurisdiction.*

(c) The Fact That the Recovery of Possession of Real Property Is No Longer an Issue in This Action Does Not Permit a Change of Venue; the Determination of Permissible Venue Depends Upon the Facts as They Existed at the Commencement of the Action.

Prior to the time appellants filed their motion for change of venue, it had been adjudicated that they could not recover possession of the mining claims which are the subject of this action. *Kasey v. Molybdenum,*

336 F. 2d 560 (9th Cir. 1964). Regardless of such disposition of the real property issue, Section 1404(a) permits transfer of an action only to a district where "it might have been brought" and such limitation is applied to the facts *as they existed at the time the action was filed.*

An action may not be transferred to a district which would not have been a proper venue for the action at the time of its commencement. Such was the clear and unmistakable holding in *Hoffman v. Blaski,* 363 U.S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960).

And since the District Court of Nevada would have been *without jurisdiction* had the action been filed therein, *a fortiori* the case may not be transferred to such Court at this time.

Appellants have stated no facts and have cited no authority in support of a different conclusion, nor have they suggested any possible error in the trial Court's determination that: "It does not appear that this action could have been instituted in the District of Nevada." It follows that the order sought to be reviewed is without error.

2. There Is No Showing That Transfer of the Action Would Serve the Interest of Justice.

Quite apart from the fact that the instant action cannot properly be transferred to a district in which it might not "have been brought", there has also been no showing which would justify a change of venue even if such action were legally possible.

28 U.S.C. Section 1404(a) provides that under certain circumstances an action may, "in the interest of justice", be transferred to another division or district

and that ". . . *the convenience of parties and witnesses* . . ." may be taken into account in determining the interest of justice.

(a) Appellants Admit That They Do Not Seek a Change of Venue for the Convenience of Witnesses or Because of the Situs of the Subject Matter of the Action.

Convenience of witnesses and situs of the subject matter of the action (in this case, the subject land is situated more closely to Las Vegas than to Los Angeles) are among the factors frequently considered in determining whether or not a change of venue would be in the interest of justice. The appellants admit that they do not seek a change of venue for either of such reasons. "No witnesses are involved in this action; nor is the subject matter of the litigation." (Appellants' Op. Br. p. 7, lines 6-7.)

While appellants are not competent to speak for appellee in stating that there are "no witnesses", such admission, together with their statement that "the subject matter of the litigation" is not involved, remove from consideration two of the often important grounds for a change of venue.

(b) The Fact That Appellants Have Moved Their Residence From California to Nevada Subsequent to Filing Their Action Does Not Justify a Change of Venue.

It was the appellants themselves who selected the present forum. Having subsequently moved to another state, they now seek to take this litigation along with them as if it were another household chattel, requesting a change of venue for their own personal convenience and citing the following reasons, among others:

(a) "travel of about 600 miles to and from their home",

(b) "traffic congestion on the Los Angeles end of the San Bernardino Freeway",

(c) "sleeping quarters are not always obtained",

(d) "nor is a parking place generally available within reasonable walking distance of this court", and

(e) "atmospheric conditions in Los Angeles are unbearable much of the time". [R. p. 8, lines 31-32; p. 9, lines 1-4.]

While appellants' personal convenience would no doubt be accommodated by transfer of the litigation to Las Vegas, the reasons proffered do not constitute, individually or collectively, a legally sufficient ground for change of venue. Certainly the ends of justice are not served by removal of a long protracted and complicated case from one forum to another in order to provide a less congested environment and a more acceptable standard of air purity, particularly at the instance of parties who initially selected the forum.

(c) A Change of Venue at This Time Would Result in Unnecessary Delay and Would Impose Additional Expenses and Burdens on Others Without Promoting the Interest of Justice.

The appellants filed the instant action on April 8, 1959. (Appellants' Op. Br. p. 1, lines 24-25.) In the ensuing period of nearly nine years, extensive pleadings have been filed and numerous hearings have been held concerning various complex questions of procedural and substantive law. This Court alone has had occasion to consider five separate petitions or appeals in addition to that before it now:

(1) On November 30, 1959 this Court granted an order allowing an interlocutory appeal pursuant to 28

U.S.C. 1292(b); such order was vacated on June 9, 1960. *Molybdenum Corporation of America v. J. Bryant Kasey, MaryAnn Kasey and Julius A. Paskan,* No. 16691.

(2) On May 7, 1963 an attempted appeal from an order denying leave to file an amended complaint was dismissed. *J. Bryant Kasey, et ux. v. Molybdenum Corporation of America,* No. 18626.

(3) An appeal taken from a partial judgment entered pursuant to Rule 54(b) was affirmed on August 28, 1964. *Kasey v. Molybdenum Corporation of America,* 336 F. 2d 560 (9th Cir. 1964).

(4) A petition for rehearing in respect to said decision of August 28, 1964 was denied on October 5, 1964. *J. Bryant Kasey, etc. v. Molybdenum Corporation of America,* No. 18695.

(5) A motion directed to this Court to vacate said judgment of August 28, 1964 was denied on September 21, 1965. *J. Bryant Kasey, etc. v. Molybdenum Corporation of America,* No. 18695.

Were this action to be transferred, the suceeding District Court judge would have to become familiar with an unusually lengthy and complex record which has accumulated over a period of nine years, a task necessarily imposing substantial additional delay and an unnecessary burden upon the judiciary, all to the *detriment* of the public interest. Moreover, such transfer would require employment of local counsel in Nevada, with consequent material added expense for appellee.

(d) There Is No Support for Appellants' Contention That the District Court Abused Its Discretion in Denying Their Motion for Change of Venue.

While appellants' make the conclusionary allegation that the District Court's denial of their motion for change of venue was "an abuse of discretion" (Appellants' Op. Br. p. 3, lines 1-2), they suggest no specific reasons, evidence or argument in support of such assertion.

As a matter of fact, the Court's ruling was in full conformity with established doctrine that once a plaintiff has chosen his forum, as the appellant's have done here, the law imposes a very heavy burden upon him if he thereafter attempts to change the venue of his action. Implicit in such holdings is the fact that the personal comfort and convenience of the plaintiff, the grounds advanced by the appellants for transfer, do not warrant a change of venue.

With one exception, every case cited by the appellants in support of their argument concerns a motion for change of venue made by the defendant and not by the plaintiff.

Much more to the point are such decisions as *Huisman v. Geuder, Paeschke & Frey Co.,* D.C. Wis. 1966, 250 F. Supp. 631, in which the *plaintiff,* as in the instant case, sought a change of venue to the district in which he resided. It was held that such showing was insufficient of itself to require transfer of the action to that district, *particularly when plaintiff has already chosen a different forum.*

The forum selected by the plaintiff as an appropriate one, in this case the U.S. District Court in Los Angeles, may not be lightly disregarded. *Axe-Houghton Fund A, Inc. v. Atlantic Research Corp.,* D.C. N.Y. 1964, 227 F. Supp. 521.

And even more important, the grounds which sometimes do justify a change of venue, the convenience of parties, the convenience of witnesses and the situs of the subject matter of the action are not present here. On the contrary, appellants argue that irrespective of the delay and expense to others, the present action is subject to transfer for the reason it would be less of a burden for them. Such contention ignores the additional burdens of time and expense which would necessarily be placed upon the Courts as well as upon the other party to the action.

It follows that the District Court was correct in concluding: "It does not appear that under the circumstances shown such a change of venue would be in the interest of justice." [R. p. 13, lines 28-30.]

3. The Claim of Bias Asserted by the Appellants Has No Foundation Whatsoever.

The appellants have displayed unusual bitterness towards both Court and counsel because of their disappointment in the judgment that the statute of limitations barred their recovery of the mining claims which are the subject of this action.

> "Of primary importance to appellants, which prompts them for a change of venue, amongst other reasons, is the policy of Judge Curtis to disregard predecessory facts before conclusions are drawn and the applicable law invoked. This was

the case in the trial of appellee's second defense in the piecemeal trial of issues in case No. 319-59-JWC Appeal No. 18695 reviewed by this court." (Appellant's Op. Br. p. 3, lines 15-20.)

Nor is their spleen vented solely upon the District Court:

"The Ninth Circuit Court of Appeals affirmed this nefarious and illegal judgment, a judgment and affirmation which plaintiff-appellants do not accept as binding in any sense whatsoever." (Appellants' Op. Br. p. 5, lines 17-19.)

The fact is that Judge Curtis' decision was affirmed by this Court (336 F. 2d 560) only after lengthy and painstaking consideration. Appellants have been accorded full courtesy and consideration at every judicial level and determinations contrary to their own position do not establish bias against them.

In the absence of even a scintilla of evidence of bias or prejudice, it may be assumed that appellants seek a change of venue not out of concern for the convenience of parties or witnesses, or the interest of justice, but rather in the hope for a new forum in which to attempt to re-litigate matters already decided against them.

This conclusion is confirmed by appellant's admission that

". . . the action should be transferred to a forum which will take cognizance of these facts and law relative thereto in the interest of justice. . . ." (Appellants' Statement of Points, p. 2, lines 23-25.)

Conclusion.

This application for review should be dismissed:

(a) The order is interlocutory in character; it is not a final judgment.

(b) The particular requirements of a discretionary appeal have not been met.

(c) There is no extraordinary circumstance which would warrant the remedy of mandamus.

Even if the order were properly before this Court, the action of the District Court should be affirmed:

(1) The action is one for recovery of California real property.

(2) Such action could only have been brought in California.

(3) Venue can be changed only to districts where the action "might have been brought."

(4) This particular action could not have been brought in Nevada.

(5) Thus transfer of the action to Nevada would not be lawfully authorized.

(6) Even if such transfer were legally possible, it would not be in the interest of justice.

(7) Adverse judicial determinations do not establish bias or prejudice.

Respectfully submitted,

SCHULTHEIS, LAYBOURNE & DOWDS,
EVERETT B. LAYBOURNE,
DENNIS KEELEY,
Attorneys for Appellee.

Certificate of Counsel.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DENNIS KEELEY

No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY E. McDOWELL,
Plaintiff-Appellant,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,
Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor-Appellant,

BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO.

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

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Intervenor-Appellant,

BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO.

Appeal from the United States District Court
for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

JURISDICTIONAL STATEMENT

This is an appeal from findings of fact, conclusions of law and judgment rendered in favor of appellees Henry McDowell, American Mail Line and against appellant Fireman's Fund Insurance Company.

The action was commenced by the filing of a complaint (R. 1) in admiralty alleging that the plaintiff, a longshoreman, was injured aboard the defendant's vessel, the SS OREGON MAIL, then berthed in navigable waters of the United States. Plaintiff's injuries were allegedly caused by the unseaworthiness of the SS OREGON MAIL.

Fireman's Fund Insurance Company filed a motion to intervene (R. 8) and claim (R. 10) asserting payment of compensation and medical benefits and seeking reimbursement.

The claim of Fireman's Fund was tried as a segregated issue upon a separate Pretrial Order (R. 14).

The District Court by Order (R. 21) of April 28, 1967, and findings and conclusions (R. 29) and judgment (R. 33) dismissed the claim of American Mail Line.

Fireman's Fund filed a motion for new trial (R. 34) which was denied by Order of May 31, 1967 (R. 37).

The District Court had jurisdiction by virtue of 28 USC § 1333 (Admiralty). This Court has jurisdiction by virtue of 28 USC § 1291 (appeal from a final decision of a District Court).

STATEMENT OF THE CASE

Henry McDowell was injured aboard the SS OREGON MAIL, owned by American Mail Line. He filed

a claim in admiralty against American Mail Line alleging that his injuries were caused by the unseaworthiness of the vessel. The parties agreed that he was a longshoreman employed by American Mail Line and that he was injured aboard the vessel (R. 23, Pretrial Order, Agreed Facts). It was also agreed that Fireman's Fund paid benefits required by the Longshoremen's and Harbor Workers' Compensation Act totalling $6,693.45 (Tr. 25, Ex. 2); compensation payments were $3,531.58, medical expense payments were $3,161.87.

The defendant had other insurance which would respond to any judgment in excess of the deductible (R. 17, Pretrial Order, Agreed Fact #7).

Prior to May of 1964, Fireman's Fund wrote both P & I (liability) and compensation for American Mail Line and had done so for 15 years (Tr. 11).

Thereafter American Mail Line and Fireman's Fund agreed, as a result of the *Reed* v. *SS YAKA* decision, that direct suits against American Mail Line would be handled as ordinary third party cases (Tr. 12). The defendant objected to the introduction of evidence of such an agreement as violating the parol evidence rule and as not within the issues of the case (Tr. 12). The trial judge permitted Fireman's Fund to make an offer of proof (Tr. 12, 13).

American Mail Line wanted Fireman's Fund reimbursed in third party type cases in order to show a favorable compensation loss record to better its competitive position in stevedoring operations (Tr. 19, 20).

The agreement was carried out as the cases arose, in some, Fireman's Fund was reimbursed, while in others, reimbursement was waived in order to assist in effectuating a settlement (Tr. 14). Correspondence was offered (Tr. 17, 18; Ex. 3, 4), but not accepted, showing the way in which the agreement was handled in individual cases.

The claim of Fireman's Fund was denied in its entirety and the previous order allowing intervention was rescinded (R. 33, Judgment).

Simply stated the case involves the question of which carrier, the compensation or liability, will obtain the benefit of prior compensation and medical payments when damages are ultimately awarded to a *Reed* v. *SS YAKA* type plaintiff.

SPECIFICATIONS OF ERROR

1. The District Court erred in holding that Fireman's Fund Insurance Company had no right to intervene.

2. The District Court erred in refusing to admit into evidence the testimony of Mr. Libby, the marine secretary of Fireman's Fund, concerning the oral agreement between American Mail Line and Fireman's Fund providing for reimbursement of Fireman's Fund (Tr. 12-25). Counsel for American Mail Line objected as follows:

> "MR. WHITE: I object to that, your Honor.
> THE COURT: I am inclined to sustain the

objection, but I am going to let you go ahead so you can make your record. You may proceed.

MR. WHITE: May I just make one objection so that it will be continuing? I object to any testimony of this witness unless it is first pointed out whether he is trying to say there is ambiguity in the policy which justifies this evidence. Also, I object to any testimony regarding any agreement or understanding on the grounds that it is not within the issues of this case and would be irrelevant in any event." (Tr. 12)

3. The District Court erred in finding that the agreement providing for reimbursement of Fireman's Fund was indefinite and uncertain, varied the terms of the written policy, and in any event not applicable to this policy.

4. The District Court erred in failing to grant reimbursement as a matter of right (law) from the plaintiff McDowell or directly from American Mail Line.

SUMMARY OF ARGUMENT

1) Where the vesselowner-employer of an injured longshoreman has two underwriters, compensation and liability, the compensation underwriter should be reimbursed out of the longshoreman's recovery as an application of the doctrine of *Reed* v. *SS YAKA* and the Longshoremen's and Harbor Workers' Compensation Act;

2) Fireman's Fund and American Mail Line formed a clear workable agreement supplementing

the written portion of the compensation insurance contract providing for reimbursement; if the agreement is not enforced, the liability carrier who has defended the case and paid off the judgment will receive an undeserved windfall.

INTERVENTION

Fireman's Fund Insurance Company paid the compensation and medical expenses due McDowell under the provisions of the Longshoremen's and Harbor Workers' Compensation Act. Traditionally the employer, or if he has compensation insurance, the carrier, has a right to intervene in the employee's damage suit to protect recoupment rights granted by 33 USC § 933 (e) and (h). See *Allen* v. *Union Barge Line*, 239 F. Supp. 1004, 1966 AMC 1525 (E.D. La., 1965) aff'd. 361 F.2d 217 (C.A. 5, 1966), cert. den. Jan. 1, 1967, 17 L. Ed. 2d 545; *Mitchell* v. *SS ETNA*, 138 F.2d 37, 1943 AMC 1126 (C.A. 3, 1943).

Intervention is governed by Rule 24 of the Federal Rules of Civil Procedure. The rule was revised in the 1966 amendments but nothing in the amendment narrowed the former rule. See *Harris* v. *General Coach Works*, 37 FRD 343 (E.D. Mich. 1964); *Johnson* v. *Standard Oil Co. of Cal.*, 30 FRD 329 (D. Alaska, 1962). In both of the cited cases, the compensation carrier under state compensation acts was permitted to intervene as a matter of right to protect its interest in recouping its compensation payments.

If the carrier, here Fireman's Fund, has a right to be reimbursed in this type of case, then it would seem clear that it has a right to intervene. The logical solution appears to be to require that the compensation carrier be deemed a necessary party. See *Poleski* v. *Moore-McCormack Lines*, 21 FRD 579, (DMD 1958). It has been held that the employer's failure to intervene is fatal to its claim for reimbursement. *U. S. Lines* v. *Jarka Corp.*, 265 F. Supp. 811 (D. Mass. 1967).

In a case where an employee sues a tort feasor who is not his employer and recovers a judgment, the cases universally hold that the agency paying Longshoremen's and Harbor Workers' Compensation Act benefits is entitled to recoup its payments. *Mitchell* v. *The ETNA*, *supra*, appears to be the lead case.

The present case arises as a result of Supreme Court decisions holding that an employee injured aboard a vessel is entitled to sue the vesselowner even if the owner is also his employer. *Jackson* v. *Lykes S. S. Co.*, 386 U.S. 731, 18 L. Ed. 2d 488 (1967); *Reed* v. *SS YAKA*, 373 U.S. 410, 10 L. Ed. 2d 448, 83 S. Ct. 1349, 1963 AMC 672 (1963).

In *Jackson* the Court stated: "* * *, the fact that the longshoreman was hired directly by the owner instead of by the independent stevedore company makes no difference as to the liability of the ship or its owner." 18 L. Ed. 2d 488 at 491. Should the compensation carrier's position be any different?

American Mail Line not only stevedores its own

vessels but also does contract stevedoring for other shipowners (Tr. 19, 20). If one of the American Mail Line longshoremen sued another shipowner for injuries, Fireman's Fund would be entitled to recoup its compensation out of the recovery even though American Mail Line might be obligated to indemnify the other shipowner. See *Allen* v. *Union Barge Line, supra; Hugev* v. *Dampsk. Int.*, 170 F. Supp. 601 (S.D. Cal. 1959) aff'd per curiam 274 F.2d 875 (C.A. 9, 1960).

This Court has been concerned with *Reed* v. *SS YAKA* type cases but has never really considered the rights of the compensation carrier.

In *Grace Line* v. *Kanton*, 366 F.2d 510, 1967 AMC 514 (C.A. 9, 1966) this Court in a per curiam decision affirmed a judgment giving the defendant credit for compensation benefits paid for wage loss but refused to give credit for payment of medical benefits. In its endeavor to follow the decision in *Reed* v. *SS YAKA*, and extend Kanton the benefits guaranteed a longshoreman employed by a third party shipowner, this Court went too far. If Kanton had recovered from a third party, he would have been obliged to repay the medical expenses as well as the compensation benefits. *Mitchell* v. *The ETNA, supra.* This Court in effect held that Kanton was entitled to double recovery, a windfall never envisaged, it is submitted, by the *Reed* and *Jackson* cases.

At the time this brief is written, this Court has before it the case of *Shaver Transportation Company*

v. *Chamberlain,* #21871, an appeal from the District Court of Oregon. The District Judge gave credit for both compensation and medical expenses thus giving the employer's liability carrier a substantial windfall totalling $35,915.47 comprised of $28,967.47 medical expenses and $6,948 compensation for wage loss to the time of trial. The compensation carrier was not a party and surely cannot be bound by a holding adverse to its interest.

Although each case should be decided on its own merits, nevertheless as this case is involved in a new area of litigation it seems relevant to point out for consideration a few instances where problems are bound to arise. Various combinations of insurance and self insurance are possible.

The shipowner-employer can be fully insured both for compensation and liability with the same insurance company in which event no real problem exists as the payments and credits could be handled as a bookkeeping matter. At the other extreme the shipowner-employer could be completely self insured, and although such a possibility seems remote, if such were the case, no problem exists as once again payments and credits could be handled as a bookkeeping matter.

The shipowner-employer could be self insured as to compensation and fully insured as to liability. If such were the case, then if the judgment were reduced by the amount of compensation payments the carrier would, in effect, be getting the benefits of a deductible policy without the reduction in premium.

If the shipowner-employer is fully insured for compensation but has a deductible provision on its liability policy, the question of who gets credit for compensation payments, if there is to be no repayment to the compensation carrier, depends first of all whether the judgment exceeds the deductible portion. Secondly, if the credit is against the deductible portion, the insured would be getting the benefit but if it is "off the top," so to speak, the liability carrier would be getting the benefit. Here Fireman's Fund fully insures American Mail Line's compensation liability while American Mail Line had a deductible on its liability coverage.[1]

A further extension of the holding in *Kanton* is that the defendant should get credit not only for past compensation but for future compensation payments, there being no reason to distinguish between credit for past and future wage loss reduced by compensation. Pertinent portions of a pretrial order in which the liability carrier handling the defense claimed a credit for future wage loss and medical benefits is set forth in the appendix. The compensation carrier had no voice in the formation of the issues. The case was ultimately settled prior to trial thus disposing of a knotty problem.

Over the years the courts have built up workable rules for handling reimbursement in the ordinary

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[1] American Mail Line's deductible was $10,000. American Mail Line's pretrial contention 8 (R. 19) asserted that repayment would be charged against American Mail Line but no evidence to support this contention was offered.

third party case i.e. repay the compensation carrier.[2]

The simple, workable and sound policy is to apply the same rule in *Reed* v. *SS YAKA* type cases thus facilitating administration of the Longshoremen's and Harbor Workers' Compensation Act and rounding out the Supreme Court's plan of eliminating arbitrary distinctions. The Court of Appeals for the Fourth Circuit apparently had these considerations in mind when it stated that:

> "If the plaintiff succeeds in this effort and ultimately in his suit, the employer may recoup the amounts already paid by deducting them when satisfying the judgment. In the event the compensation was paid by one insurer and the judgment becomes payable by another, the employer as the legal debtor in both instances may retain from the settlement of the judgment the sums necessary to reimburse the compensation carrier. The two remedies — compensation and suit—are thus made complementary. An impor-

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[2] Two problem areas are left open by *Reed, Jackson, Kanton* and *Biggs*. The first involves disposition, after deductions, of the judgment where it is less than the compensation benefits. See *Fontana* v. *Penn. Ry.*, 106 F. Supp. 461 (S.D. N.Y. 1952) aff'd 205 F.2d 151 (C.A. 2, 1953) cert. den. *Fontana* v. *Huron Steve. Co.*, 346 U.S. 886; *Davis* v *U. S. Lines*, 253 F.2d 262 (C.A. 3, 1958); *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (C.A. 5, 1966). The second involves the dilemma of the employer who wants to settle but who suspects that the longshoreman will recant and allege that the settlement is less than the value of his entitlements under the Act and claim the additional compensation benefits promised by the Act [33 U.S.C. § 933 (g)]. It has been held that where the employer was a party to the employee's action and signed the satisfaction of judgment, but was not a party to the release the employer had consented to the compromise and a deficiency claim was authorized. *Dudley* v. *O'Hearne*, 212 F. Supp. 763, 1963 AMC 1573 (D. Md. 1963).

tant purpose of the compensation statutes, to provide immediate relief to an injured employee, is achieved, and the injured party's opportunity to press further remedies remains unabridged." *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360, 364, 1966 AMC 578 (C.A. 4, 1966).

THE AGREEMENT

Fireman's Fund offered evidence of an oral agreement with American Mail Line which provided that *Reed* v. *SS YAKA* type cases were to be handled as the usual third party case in the sense that Fireman's Fund would be reimbursed out of the longshoreman's judgment or settlement. The evidence was ultimately disregarded on three grounds:

1) It was an oral variation from the terms of the written contract;

2) It was too indefinite to be enforceable;

3) It was not applicable to this policy (R. 21, Order April 28, 1967; R. 29, Findings of Fact). The Court had initially indicated that the proferred testimony of Mr. Libby was not within the issues (Tr. 12) but after hearing the testimony the Court indicated the question was whether the agreement violated the parol evidence rule and whether intervention proceedings were the proper forum to decide the issues.

There is nothing in the written portion of the insurance contract which would answer the question of

reimbursement. The question can only be answered by going outside the written agreement. This necessity was recognized by counsel for American Mail Line when he inserted as a part of defendant American Mail Line's pretrial Order, contentions 4 and 7. In 4, it was contended that the Fireman's Fund made the payments with no "expectation or agreement to have it repaid" and in 7 it was contended that when Fireman's Fund made the payments to McDowell "it did not contemplate securing reimbursement" (R. 19).

The written policy certainly cannot be varied or modified by parol evidence to suit the desires of the parties after a problem arises, but the courts have long held that parol evidence is admissible to show:

1) A collateral agreement;

2) A modification;

3) The intention of the parties.

The testimony of Mr. Libby was admissible on any and all of the above grounds. The testimony did not vary or contradict any provision of the policy and as a matter of fact was consistent with the policy. Endorsement Number Fourteen reads as follows:

> "It is understood and agreed that this policy excludes any and all liability of the Insured covered by or under the Insured's policies of protection and indemnity insurance, or for any loss, damage or expense which would have been payable under the terms of a protection and indemnity policy." (Tr. 25, Ex. 1)

The parol evidence rule bars evidence of those aspects of the contract which the parties intended to include in the writing. *Caldwell* v. *Wells*, 228 Or. 389, 395, 365 P2d 505 (1961). "Whether the parties intended to integrate their agreement in the writing is a question of fact in each case." *Caldwell* v. *Wells, supra*, 228 Or at 395.

Are oral insurance policy terms enforceable? The answer is yes. *Bird* v. *Central Mfgrs. Ins. Co.*, 168 Or. 1, 120 P.2d 753 (1942). The insurance contract is enforceable as a whole even though it is partly oral and partly written. *Cerino* v. *O.P.S.*, 202 Or. 474, 276 P.2d 397 (1954). See also *Mock* v. *Glens Falls Indemnity Co.*, 210 Or. 71, 309 P.2d 180 (1957).

While this proceeding was not a suit to reform a policy, the rules applicable to such cases are helpful to show that oral terms are enforceable. In deleting an exclusion relating to demolition work, the Wisconsin Supreme Court held that:

> "A policy of insurance may be changed or modified by a new or distinct [oral] agreement subsequently entered into between the parties." *Jeske* v. *General Acc. F. & L. Ass. Corp.*, 83 N.W.2d 167, 177 (Wisc., 1957).

See also *Knickerbocker L. Ins. Co.* v. *Norton*, 96 U.S. 234, 24 L. Ed. 689 (1877) where agreements changing the premium payment terms were upheld.

The defendant objected to Mr. Libby's testimony as a violation of the parol evidence rule. However, it

must be noted that as Mr. Libby's testimony tended to explain and tell the court what the parties had intended, his testimony was directly related to the defendant American Mail Line's pretrial contentions 4 and 7 above noted.

American Mail Line offered no evidence of the intention of the parties in support of the quoted contentions it had made. Fireman's Fund offered evidence on the issue. The District Court should have given full credence and effect to the testimony of Mr. Libby which was not only uncontradicted but corroborated by a letter from American Mail Line (Tr. 17, Ex. 4) dated February 3, 1966, just a month before Mr. McDowell's accident, and a letter from counsel (Tr. 17, Ex. 3) dated October 14, 1965.

The rule to be applied in considering the dealings of the parties is:

> " 'Previous dealings between the parties are the strongest and in most instances, the most definite basis for implying terms of a contract.' " *Hamacher* v. *Tumy*, 222 Or. 341, 350, 352 P.2d 493 (1960) quoting Patterson, Essentials of Insurance Law (2d Ed.) p. 88.

The District Court as noted by counsel (Tr. 27) has applied the same principle. See *Close-Smith* v. *Conley*, 230 F. Supp. 411 (D. Or. 1964).

The California Supreme Court has explained the rule as follows:

> " 'This was a practical construction placed upon this contract by the parties themselves,

which renders it immaterial to consider what might be the literal construction of its terms. Parties to a contract have a right to place such an interpretation upon its terms as they see fit, even when such an interpretation is apparently contrary to the ordinary meaning of its provisions.' [Quoting *Mitau* v. *Roddan*, 149 Cal. 1, 84 P. 145, 150]

"This rule of practical construction is predicated on the common sense concept that 'actions speak louder than words'. Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent.

"Appellants correctly claim that this doctrine of practical construction can only be applied when the contract is ambiguous, and cannot be used when the contract is unambiguous. That is undoubtedly a correct general statement of the law. (citing cases). But the question involved in such cases is ambiguous to whom? Words frequently mean different things to different people. Here the contracting parties demonstrated by their actions that they knew what the words meant and were intended to mean. Thus, even if it be assumed that the words standing alone might mean one thing to the members of this court, where the parties have demonstrated by their actions and performance that to them the contract meant something quite different, the meaning and intent of the parties should be enforced. In such a situation the parties by their actions have created the 'ambiguity' required to

bring the rule into operation. If this were not the rule, the courts would be enforcing one contract when both parties have demonstrated that they meant and intended the contract to be quite different." *Crestview Cemetery Association* v. *Dieden*, 8 Cal Rptr 427, 433, 434 (1960).

The Supreme Court of the United States in *Reed* v. *SS YAKA*, *supra*, separated ownership liability from employer's liability (or at least the rationale of separation is a reasonable analysis of the decision.) The defendant American Mail Line when sued by McDowell was liable as owner of the SS OREGON MAIL on which McDowell was employed when he was injured. A logical extension of the decision in *Reed* v. *S.S. YAKA* is that the compensation carrier is to be allowed recoupment of its compensation and medical payments out of the plaintiff's judgment as in the ordinary third party case where its lien is enforced. See *Haynes* v. *Rederi A/S Aladdin*, 362 F.2d 345 (C.A. 5, 1966). The defendant owner, when he is also the employer is only exchanging liability dollars and if he has liability coverage his liability carrier is only paying what it contracted to pay. It has been held that as between competing carriers the workmen's compensation carrier is to be favored. *Horne* v. *Sup. L. Ins. Co.*, 203 Va. 282, 123 S.E.2d 401 (1962).

If the shipowner has a high deductible and the longshoreman's recovery is within the deductible as is the compensation payments, the shipowner, in making the payment to the longshoreman who in

turn repays the compensation carrier, is only carrying out a business decision made for his own economic reasons. The exchange of dollars was the plan adopted by the court in *Biggs* v. *Norfolk Dredging Co., supra.*

Even if this Court would otherwise feel constrained to apply the rule of *Grace Line* v. *Kanton, supra,* and allow defendant American Mail Line an offset for compensation payments but not for medical payments, nevertheless, the *Kanton* rule is not applicable to this case where the defendant and its insurance carrier have specifically contracted for the handling of such cases.

The contract between American Mail Line and Fireman's Fund provides that American Mail Line will pay the plaintiff his full damage adjudged and that Fireman's Fund will recoup its payments from the plaintiff. The plaintiff will not receive a double recovery or windfall.

The proof submitted establishes the contract and is admissible for this purpose without violating the parol evidence rule.

Having established the right of Fireman's Fund to recoupment the question is whether this court will, by not granting an offset, enforce the terms of the insurance contract. The question can also be asked in this form: why require two lawsuits with possible attendant disparity of result and duplication of effort when by the simple expedient of allowing Fireman's Fund to recoup its payments out of the plain-

tiff's judgment the whole case is disposed of in one proceeding.

It is appropriate to quote Judge John R. Brown when the court is called upon to fashion a suitable decree:

> "The Chancellor is no longer fixed to the woolsack. He may stride the quarter-deck of maritime jurisprudence and, in the role of admiralty judge, dispense, as would his landlocked brother, that which equity and good conscience impels." *Compania Anonima Venezolana de Nav. v. A. J. Perez Exporting Co.*, 303 F.2d 692 (C.A. 5, 1962) at page 699.

CONCLUSION

1. Fireman's Fund believes that the decision in *Reed* v. *SS YAKA* establishes that the shipowner (or vessel as the case may be) is a third party within the meaning of the Longshoremen's and Harbor Workers' Compensation Act and accordingly Fireman's Fund as compensation carrier is entitled to recoup its payments out of the plaintiff's recovery from the shipowner.

2. American Mail Line and Fireman's Fund contracted to handle suits against American Mail Line by longshoremen the same as suits against a third person. The terms of such contract was proven by oral evidence and formed a binding contract which should be enforced according to the terms proven. Therefore, even if *Kanton* would preclude the adop-

tion of Fireman's Fund's analysis of *Reed* v. *SS YAKA*, the court should follow the contract made by the parties and permit Fireman's Fund to recoup its payments out of McDowell's recovery.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
LLOYD W. WEISENSEE
Attorneys for Fireman's Fund Insurance Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

LLOYD W. WEISENSEE,
Attorney

APPENDIX

"UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

GLEN R. SMITH, Plaintiff, v. STATES STEAMSHIP COMPANY, a corporation, Defendant.	Civil No. 66-389 AMENDED PRETRIAL ORDER

* * *

AGREED FACTS

* * *

"7. Plaintiff was hired by defendant through the supercargos' and Checkers' Union hiring hall to work as a checker during the discharge of cargo from the ship on July 28, 1964. Plaintiff's duties were to observe, count and mark the cargo being discharged from the No. 2 hatch on the night shift July 28, 1964. His duties required him to work on both the dock and the vessel and to enter the hold of the vessel as occasion required.

"8. While plaintiff was working in the No. 2 hatch other men who were longshoreman employees of an independent contracting stevedore company and not employees of defendant were working in the hatch discharging the cargo."

* * *

DEFENDANT'S CONTENTIONS

* * *

"5. In accordance with the Longshore (sic) and

Harborworkers' Compensation Act defendant secured to plaintiff the payment of all of his medical expenses incurred as a result of the injury alleged herein, in the amount of $193.00. Plaintiff is not entitled to recover for such expenses herein.

"6. In accordance with the Longshore (sic) and Harborworkers' Compensation Act defendant secured to plaintiff the payment of compensation in the amount of $320. Plaintiff is not entitled to recover this amount by way of past wage loss herein.

"7. Plaintiff is not entitled to recover herein for any future medical expense because under the Compensation Act his rights to full medical benefits are not terminated by judgment herein.

"8. Plaintiff is not entitled to recover herein for loss of future wages except insofar as it is proved that such future wage loss exceeds the compensation for disability secured to plaintiff by defendant in accordance with the Compensation Act."

* * *

ISSUES OF LAW

* * *

"2. Is plaintiff precluded from recovering past and future medical expense because defendant has provided him with insurance which pays such expenses?

"3. Is Plaintiff precluded from recovering past and future wage loss to the extent that defendant has provided him with insurance which pays such loss?

* * *"

No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY E. McDOWELL,

Plaintiff,

v.

AMERICAN MAIL LINE, LTD.,
a corporation,

Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,
Intervenor-Appellant.

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

BRIEF OF APPELLEE, AMERICAN MAIL LINE, LTD.

FILED
DEC 18 1957
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JAN

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Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

BRIEF OF APPELLEE, AMERICAN MAIL LINE, LTD.

With plaintiff Henry E. McDowell having abandoned his appeal this case remains as one where Appellant-Intervenor, Fireman's Fund Insurance Company (hereafter, "Fireman's Fund") is appealing from findings of fact, conclusions of law and judgment rendered in favor of Appellee-Defendant, American Mail Line, Ltd. (hereafter, "American Mail"). American Mail agrees with Fireman's Fund's jurisdictional statement.

SUPPLEMENTARY STATEMENT OF THE CASE

To supplement and clarify Fireman's Fund's statement of the case American Mail adds:

The District Court upon trial of the segregated issue (from which appeal was taken) made the following

FINDINGS OF FACT

"1. The Court incorporates by this reference the agreed facts set forth on pages 2, 3 and 4 of the pretrial order upon segregated issue on claim for reimbursement.

"2. That the alleged supplemental contract between defendant and intervening claimant modifying the insurance agreement is so indefinite and uncertain as to be completely unenforceable.

"3. That even if such contract was sufficiently definite for enforcement, the same would tend to change, modify and contradict the terms of the insuring agreement.

"4. The alleged agreement mentioned by the witness Libby, even if definite would apply only on a policy to policy basis, and, therefore, unenforceable as to this particular policy.

"5. That the alleged claim is not a proper third party claim in this action and the Court would exercise its discretion against permitting the prosecution of the claim in this proceeding."

and the following

CONCLUSIONS OF LAW

> "Based upon the foregoing findings, the Court concludes that the petition of intervening claimant for intervention should be denied and the claim for reimbursement dismissed."

A further fact is that neither in its motion to intervene (R. 8) or its claim for reimbursement (R. 10) or the carefully worked out pretrial order upon the segregated issue (R. 14) did Fireman's Fund claim or contend that an oral agreement existed pertaining in any way to modification or supplementation of the insurance policy.

It was agreed as a fact that the deductible amount which American Mail would be required to pay before any insurance responded to the claim of longshoreman McDowell was an amount in excess of Fireman's Fund's claim of $6,693.45.

The insurance policy provided, among other things, that Fireman's Fund would "pay promptly to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due"; the "Workmen Compensation Law" referring to the Longshoremen's and Harbor Workers' Compensation Act, 28 U.S.C.A. § 901 et seq. (hereafter the "Act"). All of the provisions of the Act were made a part of the policy "as fully and completely as if written" in the policy (R. 14, Ex. 1).

The "Subrogation" Clause of the policy provided:

> "K. The company shall be subrogated in case of any payment under this policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this employer or in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates." (R. 14, Ex. 1).

Section 33 of the Act (28 U.S.C.A. § 933) reads in part:

> "(a) If on account of a disability or death for which compensation is payable under this chapter the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.
>
> ". . . . .
>
> "(h) Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section."

SUMMARY OF ARGUMENT

The District Court did not err in denying Fireman's Fund's intervention and claim for reimbursement and treating benefits paid under the Act to McDowell in accordance with this Court's holding in *Grace Line* v. *Kanton*, (9 Cir., 1967) 366 F.2d 510, certiorari denied January 9, 1967, 385 U.S. 1007.

Because longshoreman McDowell was suing his employer *in personam* and not some other person, Fireman's Fund's rights could not be equated with its rights had McDowell sued a third party. No law or contract supported the intervening claim of Fireman's Fund. Handling compensation benefits paid a longshoreman under the Act (33 U.S.C.A. § 901 et seq.) as sanctioned in *Kanton*, supra, did not create unjust enrichment or windfalls as claimed by Fireman's Fund but rather prevented them.

The District Court did not err in rejecting oral testimony which sought to establish an agreement between American Mail and Fireman's Fund to treat a two-party case as a three-party case. Not only was the proffered testimony beyond the issues of the intervention but tended to vary the terms of the written insurance policy.

ARGUMENT

American Mail was not a person other than the employer of McDowell and hence neither the Act nor the insurance policy entitled Fireman's Fund to claim reimbursement.

On this appeal Fireman's Fund is complaining that longshoreman McDowell was not awarded more than he was entitled to so that it could assert a lien on the excess. Otherwise put, Fireman's Fund contends the District Court erred in following this Court's decision in *Grace Line* v. *Kanton*, (9 Cir., 1966) 366 F.2d 510, certiorari denied in 385 U.S.

1007 (1967). In that case this Court approved the deduction from a longshoreman's recovery that which was paid to him by way of compensation benefits and refused to include in such recovery medical expenses not incurred by the longshoreman.

In this case McDowell sued American Mail, his employer *in personam* to recover damages for personal injuries arising from the unseaworthiness of defendant's vessel. Such action was sanctioned by this Court in *Pacific Inland Navigation Co.* v. *Course*, (9 Cir., 1966) 368 F.2d 540, certiorari denied March 13, 1967 in 386 U.S. 963.

The intervention and claim of Fireman's Fund could only depend upon its insurance policy and the Act incorporated into the terms of its policy. Neither support its claim.

The Act gives Fireman's Fund as a compensation insurance carrier a right of subrogation only in the case where the longshoreman seeks recovery from "some person other than the employer," 33 U.S.C.A. § 933. The fact that American Mail owned or operated the vessel upon which McDowell was injured does not alter the fact of employment. As we see it, no fact in this case can be tortured so as to make American Mail a person other than the employer of McDowell.

As to the insurance policy it must be considered in the light of the Act which was expressly incorporated therein. Taken by its four corners the Act is basically one requiring American Mail as an em-

ployer to pay compensation benefits to its employees on a no-fault basis. It is American Mail, as employer and not Fireman's Fund as carrier who is liable for the payment of benefits under the Act (33 U.S.C.A. § 904); to whom receipts for payment shall be given (33 U.S.C.A. § 914 (1)); to whom notice of injury or death shall be given (33 U.S.C.A. § 912); by whom injury or death shall be reported (33 U.S.C.A. § 930); and who shall secure the payment of compensation by insuring and keeping insured such payments (33 U.S.C.A. § 932 (a)). It is this Act which required American Mail Line to take out this policy of insurance; the policy which obligated Fireman's Fund to pay promptly the entire amount of any sum due by American Mail to longshoreman McDowell.

The policy in its "Subrogation" clause "K" gave Fireman's Fund a right to become subrogated in this case to all rights of recovery vested by law in either American Mail or McDowell and against any persons, corporations, associations or estates. While the express language "some person other than the employer" is not used in the policy as in Section 33 of the Act the subrogation clause could scarcely mean anything else.

Certainly, McDowell had no right vested by law in himself to be paid damages without regard to having set off from those damages compensation payments which he had already received. Fireman's Fund by stepping into the shoes of McDowell could

have no greater right than McDowell. Likewise, it is rather ridiculous to conceive that American Mail had a right vested in law to collect money from itself or that Fireman's Fund by stepping into its shoes could have any greater rights. Neither law nor contract required the District Court to create a fund so that Fireman's Fund might impress a lien upon it for purpose of reimbursement.

The sole thrust of Fireman's Fund is based upon the proposition that American Mail is some other person than the employer of longshoreman McDowell. This proposition is contrary to the agreed fact (R. 14).

In a rather oblique approach Fireman's Fund seeks to make American Mail a third party target for McDowell's action by claiming that an application of the doctrine of *Reed* v. *SS YAKA*, (1963) 373 U.S. 410 requires it. Counsel for Fireman's Fund knows better. It was only last year that counsel for Fireman's Fund as attorney for Appellant in *Pacific Inland Navigation Co.* v. *Course*, (9 Cir., 1966) 368 F.2d 540 contended that the *in rem* action in *Yaka* was in reality a three-party situation and not authority to sanction this very type of case brought there by Course and here by McDowell directly against a ship-owner employer. Also, counsel for American Mail appeared in the *Course* case for amici curiae and joined appellant in the same contention. We both went down in defeat. In the *Course* case this Court not only refused to see a three-party sit-

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Another surprising contention is made by Fireman's Fund though under the wrong heading of its brief. On page 17 of its brief Fireman's Fund urges that the Supreme Court in *Yaka* by its rationale separated ownership liability from employer liability of the defendant and hence it would be logical for this Court to extend that concept by treating American Mail as having a dual personality. We do not read *Yaka* as does Fireman's Fund. The most we see in *Yaka* is that the longshoreman urged that it had only sued the ship *in rem* and not the shipowner employer and that he should recover against the ship irrespective of any personal liability on the part of the shipowner. It was this "personification of the ship" contention that the Supreme Court found unnecessary to decide. However, Mr. Justice Harlan, in a footnote to his dissenting opinion (373 U.S. 410 at 419) made it clear that the "personification of the ship" concept, if it ever existed, was long out of style. We quote in part from the footnote:

> ". . . The reason against its application to create substantive liability was eloquently stated by Mr. Justice Bradley, speaking for the Court

> in *The City of Norwich,* 118 U.S. 468, 503: 'To say an owner is not liable, but that his vessel is liable, seems to us like talking in riddles. . . . In the matter of liability, a man and his property cannot be separated . . .' "

With the Supreme Court apparently being of the view that for liability reasons a ship cannot be divorced from her owner, it scarcely appears that it would be of a mind to fictionally split the corporate entity so that simultaneously it could have an owner-liability and an employer-nonliability. Besides, any fiction to make American Mail in whole or in part someone else other than the employer of McDowell would be repugnant to the agreed fact.

The woes of American Mail were brought about by this Court in *Course* stripping it of the protection against direct action by an employee that it always considered it had under Section 105 of the Act (33 U.S.C.A. § 905). It reached its result by refusing to see in *Yaka* a three-party situation. Consistency and fairness should leave American Mail in the two-party situation where this Court placed it unless the *Course* decision is to be undone. It should be too late for this Court to be influenced by the argument of Fireman's Fund that a simple, workable and sound policy is to now treat American Mail as a person other than the employer in order to enable Fireman's Fund to recoup insurance policy payments as it does in third-party actions. Such a policy would be far from simple as it would destroy the right of Amer-

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There is no justification for this Court to change its decision in the Kanton case.

The District Court did not err in following this Court's decision in *Grace Line* v. *Kanton,* (9 Cir., 1966) 366 F.2d 510, certiorari denied in 385 U.S. 1007 (1967). In *Kanton* this Court approved the District Court deducting from what it would otherwise award a longshoreman the amount he had already received by way of compensation under the Act from his defendant-employer. Where the longshoreman's medical expenses were incurred and paid for by the employer and not the longshoreman they were not included in the longshoreman's award.

While this simple method of insuring that the longshoreman is not unjustly enriched cannot be employed where the longshoreman is suing a person other than his employer, this, in itself, is no reason for not using this direct method where he is suing his employer. The charm of the method is that unjust enrichment is guarded against within the confines of the parties and issues of the longshoreman's action. Since it is the employer and not his insurance carrier who is liable to pay benefits under the Act there is no reason why a District Court should become obligated to broaden issues or decide collateral matters between the defendant-employer and one or more of its insurance carriers.

In attacking the wisdom of *Kanton*, Fireman's Fund argues that this Court went too far in that it gave American Mail credit for compensation payments but not for medical payments. From this it argues that had American Mail been a third-party, McDowell would have been given a full award and then be required to repay to American Mail both compensation and medical benefits and for that reason McDowell secured a windfall. We disagree. Under *Kanton*, McDowell was compensated only for his actual money loss. With his award offset by compensation previously received and his not being paid for medical expenses which he had not incurred McDowell received no windfall and hence had nothing to pay back. Because Fireman's Fund made the payments for American Mail instead of American Mail making the payments as required by the Act and then being reimbursed by Fireman's Fund under the policy is of no significance so far as McDowell or American Mail is concerned.

However, a more involved windfall argument is made by Fireman's Fund in respect to American Mail and its P & I insurance carrier. It appears that the first $10,000.00 of McDowell's $42,447.03 award was paid by American Mail and the balance by its P & I insurance carrier. The District Court denied repayment to Fireman's Fund of the $6,693.45 which it paid on behalf of American Mail for compensation and medical benefits because such was not included in McDowell's award.

Who of the three losers: American Mail, Fireman's Fund, or the P & I insurance carrier, gained a windfall? If the $6,693.45 "credit" was taken off the bottom of the $42,447.03 American Mail did not have to pay a full $10,000 and if taken off of the top, the P & I underwriter was saved paying what it would otherwise possibly have paid had American Mail been a third-party. However, there is another side of the coin. Had the matter been handled with American Mail as a third party, Fireman's Fund would have recouped its $6,693.45, but since American Mail was not in reality a third party it would be Fireman's Fund which gained a windfall to the full extent of its recoupment. Neither the Act nor the policy contemplated recoupment of money paid under the policy for American Mail or that recoupment could be had at the expense or detriment of its insured.

Moreover, if the P & I carrier's position is viewed as that of insuring American Mail as a third-party shipowner, we find it not gaining a windfall, but rather losing along with American Mail the right to be indemnified under *Ryan* by McDowell's employer. Since the Fireman's Fund policy insured American Mail as McDowell's employer, including any contractual right-over liability to a third person (Endorsement No. 12 to policy), Fireman's Fund would have written a check for the full $42,477.03 as well as defense expense. In short, in the case below the only one for certain who is gaining a very substantial windfall by the District Court following *Kanton*

is Fireman's Fund; the very person who is pointing its "windfall" fingers at others.

Nor, should the *dicta* in *Biggs* v. *Norfolk Dredging Company*, (4 Cir., 1966) 360 F.2d 360 persuade this Court to change its position in the *Kanton* case. We say *dicta* because the question as before this Court in *Kanton* was not before the Court of Appeals for the Fourth Circuit for decision. The *Biggs'* case was actually two consolidated appeals by workmen who had in different situations applied to state compensations commissions for compensation, claiming they were not seamen. Thereafter, each brought an action against their respective employers in the District Court claiming each was either a "Jones Act" or a "Sieracke" seaman. The District Court summarily dismissed both cases. The Court of Appeals reversed, holding that each workingman was not estopped by having made application for compensation from going to trial and establishing, if he could, his actual seaman status. It was only in such context that the Court, in order to show no incompatability between the compensation scheme and court action, observed how the problem of compensation payments *might* be handled. The Court merely stated that *if* the workingmen were successful in their litigation the defendant in each case "may retain from the judgment the sums necessary to reimburse the compensation carrier." No holding was made to require the matter to be handled as suggested.

This Court should adhere to its *Kanton* decision

and leave the insurance companies exactly where their carefully drafted insurance policies place them. They are thoroughly capable through policy endorsements or the adjustment of premiums to take care of themselves and make equitable contractual arrangements in light of *Kanton*.

District Court did not err in rejecting testimony of oral agreement; its findings that such was too indefinite, varied terms of the policy and beyond issues was not clearly erroneous.

Over objection of American Mail, Mr. Libby of Fireman's Fund testified that there was an agreement between American Mail and the Fireman's Fund that "these YAKA cases" would be handled the same as a third party case (Tr. 12, 14). The District Court's findings of fact that: (1) such alleged agreement was too indefinite to be enforceable; (2) would tend to change, modify or contradict the terms of the insurance policy; (3) could not be applicable to the specific policy; and (4) not properly the basis for the third party claim in intervention (R. 29) were supported by the evidence and were not clearly erroneous.

American Mail upon opening statement objected to the proof of an oral agreement claiming surprise in view of such contention not being set forth in the pre-trial order and further that if such oral agreement existed it should be litigated in a separate action (Tr. 7-8). It also objected to the evidence being admitted (Tr. 12).

As to this oral agreement no evidence was introduced to show between what individuals it was made, or when or where it was entered into. Further, it lacked certainty in that it failed to show how the parties had agreed, if at all, to handle any right-over for indemnity if American Mail was to be treated as a third party shipowner while the same American Mail was to be treated as McDowell's employer. These among other things made the evidence of the agreement too uncertain for enforcement.

The alleged oral agreement varied the term of the policy whose subrogation clause coupled with Section 33 of the Act (28 U.S.C.A. § 933) authorized recoupment through subrogation which could only be had against persons other than the insured.

The alleged oral agreement appears to have been made before the present policy was written, although it is vague in this respect. If so, it could not affect the present written policy which would have superseded any prior understandings. Of significance here is that Endorsement No. 12 to the policy (R. 14, Ex. 1) was an undertaking in writing to interpret and clarify a portion of the policy. If any oral agreement had previously existed it should have been incorporated into the policy while Endorsement No. 12 was in the making. Upon the offer of proof, Mr. Libby conceded such could have been done but was not done (Tr. 24).

The most that Fireman's Fund "Agreement" contention (p. 12) in its brief establishes is that its in-

itial "Intervention" contention (p. 6) is found wanting in merit. Neither the Act nor policy established American Mail as a third party. Likewise, Fireman's Fund failed to establish such status for American Mail by an oral agreement.

On this appeal American Mail takes the same position as it did at the trial. On opening statement its counsel stated (Tr. 7):

> ". . . I see nothing in the insurance policies which have been exhibited that there is some agreement. My answer to that is that if there is an agreement it is something that American Mail Line will honor just as much as Fireman's Fund will honor, but it has no place in this case."
>
> "This started out as a case by a longshoreman against American Mail for a second bite in the apple, and the intervenors had an interest here on this compensation. In this case if it is a question of handling the compensation, the pretrial order shows that under the Act and under the policy they are entitled to handle this compensation payment the way they contend and the way we contend. I am certainly going to object to any evidence of any other agreement between the parties, and if there is an agreement it is not for this Court to be concerned with. It is for Fireman's Fund and American Mail Line to honor, and if they don't honor it to sue or to seek declaratory relief."
>
> "I am defending a very serious case here by a longshoreman against the American Mail Line, and I don't think we should be getting into all of these collateral matters, especially as to some

1007 (1967). In that case this Court approved the deduction from a longshoreman's recovery that which was paid to him by way of compensation benefits and refused to include in such recovery medical expenses not incurred by the longshoreman.

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American Mail upon opening statement objected to the proof of an oral agreement claiming surprise in view of such contention not being set forth in the pre-trial order and further that if such oral agreement existed it should be litigated in a separate action (Tr. 7-8). It also objected to the evidence being admitted (Tr. 12).

As to this oral agreement no evidence was introduced to show between what individuals it was made, or when or where it was entered into. Further, it lacked certainty in that it failed to show how the parties had agreed, if at all, to handle any right-over for indemnity if American Mail was to be treated as a third party shipowner while the same American Mail was to be treated as McDowell's employer. These among other things made the evidence of the agreement too uncertain for enforcement.

The alleged oral agreement varied the term of the policy whose subrogation clause coupled with Section 33 of the Act (28 U.S.C.A. § 933) authorized recoupment through subrogation which could only be had against persons other than the insured.

The alleged oral agreement appears to have been made before the present policy was written, although it is vague in this respect. If so, it could not affect the present written policy which would have superseded any prior understandings. Of significance here is that Endorsement No. 12 to the policy (R. 14, Ex. 1) was an undertaking in writing to interpret and clarify a portion of the policy. If any oral agreement had previously existed it should have been incorporated into the policy while Endorsement No. 12 was in the making. Upon the offer of proof, Mr. Libby conceded such could have been done but was not done (Tr. 24).

The most that Fireman's Fund "Agreement" contention (p. 12) in its brief establishes is that its in-

itial "Intervention" contention (p. 6) is found wanting in merit. Neither the Act nor policy established American Mail as a third party. Likewise, Fireman's Fund failed to establish such status for American Mail by an oral agreement.

On this appeal American Mail takes the same position as it did at the trial. On opening statement its counsel stated (Tr. 7):

> ". . . I see nothing in the insurance policies which have been exhibited that there is some agreement. My answer to that is that if there is an agreement it is something that American Mail Line will honor just as much as Fireman's Fund will honor, but it has no place in this case."
>
> "This started out as a case by a longshoreman against American Mail for a second bite in the apple, and the intervenors had an interest here on this compensation. In this case if it is a question of handling the compensation, the pretrial order shows that under the Act and under the policy they are entitled to handle this compensation payment the way they contend and the way we contend. I am certainly going to object to any evidence of any other agreement between the parties, and if there is an agreement it is not for this Court to be concerned with. It is for Fireman's Fund and American Mail Line to honor, and if they don't honor it to sue or to seek declaratory relief."
>
> "I am defending a very serious case here by a longshoreman against the American Mail Line, and I don't think we should be getting into all of these collateral matters, especially as to some

agreement which I don't know anything of at this moment."

Contrary to Fireman's Fund the District Court did not "rescind" its intervention but rather gave Fireman's Fund its full day in Court. The District Court did not abuse its discretion in dismissing the petition and denying Fireman's Fund's claim after giving it a full day in court.

Respectfully submitted,

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American Mail Line, Ltd.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

WILLIAM F. WHITE
Attorney for Appellee

No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY E. McDOWELL,

Plaintiff-Appellant,

v.

AMERICAN MAIL LINE, LTD., a corporation,

Defendant-Appellee,

FIREMAN'S FUND INSURANCE COMPANY,

Intervenor-Appellant.

REPLY BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO.

Appeal from the United States District Court of the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

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No. 22240

United States
COURT OF APPEALS
for the Ninth Circuit

HENRY E. McDOWELL,

Plaintiff-Appellant,

v.

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FIREMAN'S FUND INSURANCE
COMPANY,

Intervenor-Appellant.

REPLY BRIEF OF APPELLANT FIREMAN'S FUND INSURANCE CO.

Appeal from the United States District Court of the District of Oregon

HONORABLE JOHN F. KILKENNY, District Judge

Intervention

The Appellee's Brief (pages 5-15) is mainly concerned with avoiding the application of the rules in the usual third party case to this case.

It is obvious that the only real party in interest on the appellee's side is the P & I (liability) carrier. The P & I carrier seeks to hide behind its insured. It offered no evidence in support of its pretrial contentions 4 and 7 (R. 19); furthermore, it never produced its policy. The P & I carrier now asserts (Br. 13) that if Fireman's Fund is given relief, then the P & I carrier should be awarded indemnity a-la *Ryan. Ryan Stevedoring Co.* v. *Pan-Atlantic S. S. Corp.* (1956), 350 U.S. 124, 76 S. Ct. 232, 100 L. Ed. 133. This claim was not made below and it can be nothing more than an afterthought calculated to confuse the issues before this Court.[1]

The Agreement

Appellee (Br. 15) seeks affirmance of the District Court findings regarding the agreement on two grounds: (1) uncertainty of terms providing for reimbursement; and, (2) surprise.

The District Court originally allowed the testimony under Rule 43 (c) F.R.C.P. relating to offers of proof. The reviewing court can consider the testimony even if disregarded by the lower court. *F. H. McGraw & Co.* v. *Milcor Steel Co.*, 149 F.2d 301, 306 (C.C.A. 2, 1945).

---

[1] Appellee urges that Endorsement 12 of the policy would make Fireman's Fund liable on an indemnity claim. This, of course, is erroneous as Endorsement 12 of the policy provides coverage for negligence, not, as now asserted in the P & I carrier's behalf, coverage for the contractual liability arising out of a breach of the warranty of workmanlike service.

The proffered testimony of Mr. Libby was sufficient to prove the point sought to be established by Fireman's Fund, to-wit: there was an arrangement that Fireman's Fund would be reimbursed in the event of a direct suit by the injured employee against American Mail Line.

An offer of proof need only be sufficient to permit the court to rule intelligently on the propriety of the offered evidence. *Downey* v. *Traveler's Inn*, 243 Or. 206, 211, 412 P.2d 359, 362 (1966). There were no objections at the trial as to the form of the questions or answers, no questions on cross-examination as to any of the issues now raised as to the names of individuals, the exact dates or places of the agreement.

The appellee could hardy claim surprise (Br. 15) or that it was unaware of the agreement or practice sought to be proven by Fireman's Fund. Counsel for appellee did not do his homework either in engaging in discovery or interviewing American Mail Line personnel or the P & I carrier's personnel. The agreement was indisputably made and followed. No evidence to the contrary was presented. Appellee alleged there was no intention that Fireman's Fund be reimbursed but offered no evidence in support of its allegations regarding the intention of the parties.

CONCLUSION

No logical reason has been advanced for giving the P & I carrier the benefit of the money paid by Fireman's Fund.

Respectfully submitted,

GRAY, FREDRICKSON & HEATH
LLOYD W. WEISENSEE
Attorneys for Fireman's Fund Insurance Company

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT LEE SIMS,

Petitioner,

vs.

FRANK A. EYMAN,
Superintendent of Arizona
State Penitentiary,

Respondent.

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APPELLEE'S ANSWERING BRIEF

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DEC 11 '67

No. 22242

IN THE

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FOR THE NINTH CIRCUIT

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ARGUMENT

I

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER WHERE THE JURY HAS THE POWER TO ASSESS THE DEATH PENALTY IN A CAPITAL CASE AND DOES NOT HEAR EVIDENCE IN MITIGATION OF PUNISHMENT, THERE IS A DENIAL OF EQUAL PROTECTION OR OF DUE PROCESS

Appellant's argument on the question presented is persuasive of the proposition that the law ought to be amended so that evidence in mitigation of punishment might be presented to a jury. His argument, however, falls far short of establishing that Arizona's procedure denies him equal protection or due process. Applicant is in the wrong forum. The relief he seeks should be sought from the legislature of Arizona or from the Arizona judiciary in the exercise of its rule-making power.

Appellant questions the propriety of a trial in which a jury passes on the question

of guilt and the question of penalty. In Pope v. U.S., 372 F.2d 710, 370, the court stated:

> "Our conclusion is fortified by the supreme court's very recent remarks in Spencer v. State of Texas, 385 U.S. ___, 87 S.Ct. 648, 17 L.Ed.2d ___ (1967) about two-stage jury trial procedure. There, Mr. Justice Harlan, author of the principal opinion, said, 'Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.' "

(Spencer v. Texas is found at 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606.)

The legislature of Arizona has determined that the choice of penalty in first degree murder shall be on the basis of an attempt to make the punishment fit the crime, rather than the criminal. It has decreed that the determination is to be based on the facts admissible to prove the crime itself and the circumstances surrounding it, rather

than the facts of the defendant's history and personality. Nothing in our constitution prohibits such a decree, however much modern penology may inveigh against the wisdom of the decree.

ARGUMENT

II

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER THE DUE PROCESS CLAUSE IS VIOLATED BY THE EXCLUSION OF JURORS BECAUSE OF THEIR OPPOSITION TO THE DEATH PENALTY

The trial court excused certain jurors. (See Exhibit A attached to appellant's application for writ of habeas corpus herein.) They were not excused "because of their opposition to the death penalty". They were excused because they indicated that under no circumstances would they bring in a verdict of guilty with a recommendation of the death penalty.

The question here is not whether a person should be excused from a jury because he disapproves of capital punishment, but whether he should be excused for cause if in no case he could return a verdict of death. State v. Narten, 99 Ariz. 116, 407 P.2d 81.

The people of the State of Arizona, by initiative measure, Laws of Arizona, 1919, Initiative and Referendum Measures, pp. 17, 18, 20, re-instituted the death penalty in Arizona for first degree murder, 5 A.R.S. 193, § 13-453. Assuming that the death penalty itself is proper, (infra, Argument IV, p. 12) the state is entitled to a juror who can, in the proper case, inflict that proper punishment, just as the defendant is entitled to a juror who, in the proper case can vote to acquit. The state as well as the defendant is entitled to an impartial jury, and a juror who could not find for the state on a given issue, regardless of the evidence which might be presented, would simply not be an impartial juror. Reynolds v. United States, 98 U.S. 145 (8 Otto. 145).

ARGUMENT

III

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER A STATE PROSECUTION MAY BE INITIATED BY INDICTMENT RATHER THAN BY INFORMATION

Appellant claims that there is a trend in the direction of holding that rights guaranteed by the first ten amendments are secured to the citizen from violation by the states by virtue of the Fourteenth Amendment; and that this Court should find, in anticipation of such finding by the United States Supreme Court, that prosecution by preliminary hearing is a violation of due process.

Article 2, § 30 of the Constitution of the State of Arizona provides as follows:

> "No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."

This constitutional provision is implemented by Rule 78, Rules of Criminal Procedure, 17 A.R.S. 192, which provides as follows:

> "A. Every felony and every misdemeanor of which the superior court has original jurisdiction shall be prosecuted by indictment or information, and every misdemeanor may be prosecuted by indictment or information." (Emphasis supplied)

The United States Supreme Court in holding that prosecution by information is constitutional the Court used this language in Hurtado v. California, 110 U.S. 516:

> "Tried by these principles we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

Maxwell v. Dow, 176 U.S. 581, used this language:

> "The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of Hurtado v. California,

110 U.S. 516. The case has since been frequently approved. Hallinger v. Davis, 146 U.S. 314, 322; McNulty v. California, 149 U.S. 645; Hodgson v. Vermont, 168 U.S. 262, 272; Holden v. Hardy, 169 U.S. 366, 384; Brown v. New Jersey, 175 U.S. 172, 176."

The Missouri case of State v. Waller, 382 S.W.2d 668, involved a murder prosecution by information which was affirmed. The Court said:

"Finally, appellant's claim that he could have been charged with a capital offense only by an indictment, and not by an information is obviously without merit . . . The requirement of the Fifth Amendment to the Constitution of the United States has no application to state procedure in this regard. Hurtado v. California, 110 U.S. 561, 534, 4 S.Ct. 111, 28 L.Ed. 232; State v. Cooper, Mo. Sup. 344 S.W.2d 72 (1-3)."

See also, Horner v. State, 168 So.2d 137 (Fla.).

There is a strong trend in the decisions of the Supreme Court toward preserving to the citizen substantial rights from which he may

benefit. It is not a trend toward the preservation of ancient forms, where newer forms have bestowed substantial benefit upon the citizen charged with crime.

Rule 16, Rules of Criminal Procedure, 17 A.R.S. 94, provides that a defendant brought before a magistrate after arrest on a felony charge, has a right to an immediate preliminary examination in order to determine whether or not there is probable cause to believe the defendant is guilty of any offense.

The defendant has a right to have counsel present at such examination. (Rules 16, 18, 19) He has the right to have witnesses summoned, to have their testimony heard, and to have them sequestered. (Rules 22, 26, 27) All witnesses shall be examined in the presence of the defendant and may be cross-examined. (Rule 23) The defendant may make a statement concerning the charges against him, and may answer the

charge and explain the facts appearing against him. (Rule 24) He may order a transcript of the entire proceedings. (Rule 28)

If the Rules of Criminal Procedure are not followed, or if the evidence is not sufficient to support a finding of probable cause, relief is available by habeas corpus and motion to quash. State ex rel Corbin v. Superior Court, In and For the County of Maricopa, 357 P.2d 144 (1966), 100 Ariz. 236, 413 P.2d 264, opinion modified on rehearing 100 Ariz. 362, 414 P.2d 738. Defense counsel usually ask for and obtain a preliminary hearing for the purpose of learning the nature of the prosecutor's case. State v. Essman, (1965) 98 Ariz. 228, 403 P.2d 540, at 542.

Grand jury proceedings are secret. The defendant has no right to be present; his counsel may not be present; defendant may not

have witnesses present, nor cross-examine the witnesses against him. There is even no absolute right to a transcript of the proceedings. The preliminary hearing, rather than violating the standard of due process, has raised a new standard of fairness to the accused and has placed new burdens on the prosecution and new protection around the rights of the accused. It is significant that neither this, nor any other defendant, has objected to prosecution by information before the time of the trial. If any incursion on his rights were involved, he waived his right to complain thereof when he enjoyed the benefits of the preliminary hearing.

ARGUMENT

IV

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER THE DEATH PENALTY IS UNCONSTITUTIONAL AS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Appellant makes a cogent argument for the proposition that the death penalty is unwise, immoral, ineffective and unpopular; but he fails to reach the question of its cruelty, unusualness and unconstitutionality.

Mr. Jeremy Bentham, in his Rationale of Judicial Evidence Specially Applied to English Practice, London, Hunt & Clarke, 1827, 5 Volumes, admonishes judges and legislatures to refrain from formulating unbending rules, imposing on the trier of fact the obligation of reaching certain conclusions from certain evidence. He is willing to allow, however, that where the mischief of the decision, if erroneous, is irreparable, there is some prospect that such unbending

rules might, on the whole, prove beneficial.

He says:

> "The other case comprehends in its whole extent the range of capital punishment: the only species of punishment which is absolutely and totally irreparable. But, of the consideration of this irreparability, what is the true result? The impropriety of this mode of punishment: not the propriety of those unbending rules.
>
> In the instance in question, it was the consideration of the nature of the punishment--of the property thus belonging to it--that called into action the humane temerity of the judge. In every system of law into which this irreparable mode of punishment has been admitted,--but most of all in the English system, in which the fondness shewn to it is so great, and so continually upon the increase,--the system of procedure in general, and of the law of evidence in particular, teems with rules and practices tending to the encouragement of criminality in every shape, and most of all in such as are most mischievous. Capital punishment has thus been all along operating, and will continue to operate with continually increasing force, as a slow poison upon the whole system of procedure, including that of evidence. Thus it is that the work of real inhumanity and of false humanity,

> of folly under that specious name, go on together: and, while substantive law, with its favourite and unwearied instrument, capital punishment, is straining every nerve to tighten the bands of society,--adjective law, with its prejudices and inconsistencies, is as pertinaciously employed in loosening them."

From the earliest days of our republic the wisdom of the irreparable mode of punishment has been in question, but the Constitution does not proscribe folly, it proscribes cruelty and unusualness.

When appellant asserts that "our society has progressed to the point where our standards of decency which are the measure of the Eighth Amendment deny that the state has any inherent right to impose punishment which either exceeds or cannot achieve the legitimate objectives of punishment", he, by far, over-estimates American standards of decency.

In the interests of our convenience and saving of time, we tolerate the violent

deaths of thousands in traffic accidents. In the pursuit of amusement to while away the leisure gained at such cost, millions of viewers watch thousands of hours of indecently violent behavior. In the pursuit of undefined, and undefinable, goals, we applaud the violent destruction of our "enemies".

If there is such a trend toward decency, it is for the legislatures to measure the trend. It is for the legislatures to act for society in making its standards of decency the law of the land. The legislature is equipped to discover a moral consensus and empowered to clothe that consensus with the force of law. The right of the state to sacrifice the lives of its citizens, or others, to the state's interests, whether or not such sacrifice is likely to secure the state's objectives, can be questioned; but the questioner's voice will echo hollowly

in the moral wilderness of modern America.

ARGUMENT

V

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER DUE PROCESS PRECLUDES THE INTRODUCTION OF THE TESTIMONY OF AN ACCOMPLICE WHOSE TESTIMONY IS SUSPECT BY REASON OF INTEREST

To conceal the witness' interest would be despicable and violative of due process. See, State v. Taylor, 231 A.2d 212 (Supreme Court of New Jersey, 1967) To bar the testimony of all interested witnesses would place an insurmountable, purposeless stumbling block in the path to truth.

The appellant was protected by legislation and court rule from imposition by jury or prosecutor. 5 A.R.S. 21, § 13-136 reads as follows:

> "A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which, in itself and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense. The corro-

boration is not sufficinet if it merely shows the commission of the offense or the circumstances thereof."

In this connection, see State v. Howard, 97 Ariz. 339, 400 P.2d 332.

Rule 29, Rules of the Supreme Court, 17 A.R.S. 112, reads as follows:

"The primary duty of the lawyer engaged in public prosecution is not to convict but to see that justice is done."

Due process can ask no more.

CONCLUSION

The order of the United States District Court denying petitioner's petition for a Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

DARRELL F. SMITH
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CARL WAAG
Assistant Attorney General

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn upon oath, deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
CARL WAAG

SUBSCRIBED AND SWORN to before me this _____day of December, 1967.

_____
Notary Public

My commission expires:

_____

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No. 22243

United States Court of Appeals
For the Ninth Circuit

PACIFIC INLAND NAVIGATION CO., INC., *Appellant,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

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United States Court of Appeals
For the Ninth Circuit

PACIFIC INLAND NAVIGATION CO., INC., *Appellant,* vs. FIREMAN'S FUND INSURANCE COMPANY, *Appellee.*	No. 22243

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

REPLY BRIEF OF APPELLANT

I

ANSWER TO APPELLEE'S ARGUMENT THAT THE HUMPLA LAW SUIT WAS NOT AN EMPLOYER'S LIABILITY

Appellee argues that, all elements of construction aside, Coverage One (b) does not apply to a Humpla-type law suit since the liability theory under which Humpla asserted his claim was against a shipowner and not an employer. To reach this conclusion Appellee completely ignores the status of Humpla as a direct employee of Pacific Inland Navigation Company.

Appellee argues (Appellee's brief, p. 12, 13) that historically a Humpla-type law suit would not be

covered under this coverage. This does not follow. Humpla was undeniably an employee of Appellant. The opening statement of the policy in question emphasizes the basic factor of the employer-employee relationship as the very foundation of the policy. Only if Coverage One (b) can be read out of the policy can coverage be escaped.

Appellee refers often to compensation coverage and P&I coverage, implying this case can be solved merely by defining types of insurance coverage and inserting such facts as Appellee chooses (Appellee's brief, p. 13, 14 and 16). This attempt at solution by classification completely ignores the plain language of the contract of insurance in question.

The fallacy in employing this argument of classification is evidenced in Appellee's citation of *Indemnity Insurance Co. v. California Stevedore & Ballast Co.* (Appellee's Brief p. 13). Appellee cited this case for the rule that where an independent stevedore and employer is sued by a vessel owner for injuries occurring on a vessel to a longshoreman, the liability of the stevedore-employer is within its public liability policy rather than its employer's liability policy.

The *Indemnity* case is clearly distinguishable from this action because of the significant differences in wording of the policies involved. The pertinent parts of the policy of insurance in *Indemnity* are cited at 307 F.2d 513, 515 n. 1. Coverage A in that policy pertains to coverage for bodily injury liability. Exclusion (c) makes coverage A inapplicable "except with respect to liability assumed under written contract * * * ." Since the case dealt with shipowner indemnity from a stevedore-employer, based on the contractual

relation between the two, the exception stated within Exclusion (c) rendered that exclusion inapplicable, resulting in coverage under Clause A.

Exclusion (c) in the *Indemnity* case, as Appellee points out in its brief at page 13, referred to Workmen's Compensation liability. This was so because of the particular wording of Exclusion (c):

> "This policy does not apply under coverage A ... to bodily injury ... of an employee of insured ... other than a domestic employee for whose injury benefits are not payable or required to be provided under any *workmen's compensation law;* or to any obligation for which the insured ... may be held liable under any *workmen's compensation law;* ..." (Emphasis added) 307 F.2d 513, 515, n. 1.

In this particular case, under Policy LS-1214, nothing in Coverage One (b) restricts its applicability in the manner Appellee contends. Quite to the contrary, since Coverage One (a) clearly deals with compensation, Coverage One (b) is left to cover other types of liability to which Appellant may be subjected by reason of the employer-employee relationship.

II

ANSWER TO APPELLEE'S ARGUMENT THAT POLICY LS-1214 COVERS ONLY LONGSHOREMEN'S AND HARBOR WORKERS' ACT BENEFITS

Only by excluding Coverage One (b) of this policy can Appellee escape liability. Where, then, is the exclusion?

It is clear from a reading of the policy that Coverage One (a) and Endorsement No. 1 that the Longshoremen and Harborworkers' Compensation Act is covered by this policy. As Appellee states in its brief (p. 5), Endorsement No. 1 is inclusive and not restrictive. As Appellee states, other compensation acts could presumably be added. This concession by Appellee indicates the very reason for the existence of Endorsement No. 2, that is, to limit the compensation acts covered to only the Longshoremen and Harbor Workers' Compensation Act.

While the restriction on Coverage One (a) is clear, there is no such clear restriction on Coverage One (b). The second paragraph in Endorsement No. 2 falls far short of the clear exclusion or restriction of Coverage One (b) that the rules of construction require.

Appellee states that the only basis for the presence of Coverage One (b) is in the event the Longshoremen and Harbor Workers' Compensation Act is declared unconstitutional. Yet Appellee cites *Crowell vs. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932) as upholding the constitutionality of that Act. The mere citation points out that this Act has been recognized as constitutional for over thirty-two years at the time the policy in question was written.

Reading typewritten Endorsement No. 4, setting up $100,000 limit on Coverage One (b), without any other restriction whatever points out that Coverage One (b) was not meant to be limited, as Appellee contends.

Appellee's brief (p. 7) points out that the Washington King County Superior Court has ruled on this identical issue in favor of Firemen's Fund. It is im-

portant to note in that context, however, that the Superior Court in its Finding of Fact XII took judicial notice of the District Court decision from which this appeal is taken. In essence, Judge James merely followed Judge Bolt's earlier opinion and perpetuated the earlier error.

We should also direct the Court's attention to a very similar case to the one at hand from this Circuit, where the effect of an endorsement or rider was subject to construction. In the case of *Aetna Ins. Co. v. Sacramento-Stockton S.S. Co.,* this Court stated:

> "It is contended that the rider was intended to express all the risk incurred by the insurer. We do not so construe it. It is true it begins with the words 'This policy is to cover only as follows:' but we think the words mean no more than that the insurer intended to substitute the two provisions contained in the rider for corresponding provisions in the body of the policy, and that as to those two provisions the policy was 'to cover only' as expressed in the rider. One of the substituted provisions is the collision clause, which differs in form from and takes the place of the collision clause which was deleted from the body of the Aetna policy. The provision in the riders as to loss or damage caused by fire appears to have been inserted for the purpose of limiting such loss to the 'terms and conditions of the regular California standard form of fire policy as issued by the Aetna Insurance Company.' In the body of the policy fire is simply mentioned as one of the risks insured against.
>
> "The same construction, we think, should be given to the other two policies, although there are no deletions therein. They each contain in the body of the policy a fire risk and a collision clause. It is the language of the insurance company that we are called upon to construe, 'and it is both

reasonable and just that its own words should be construed most strongly against itself.' *National Bank v. Insurance Co.,* 95 U.S. 673, 679, 24 L.Ed. 563; *Thompson v. Phoenix Ins. Co.*, 136 U.S. 287, 10 Sup. Ct. 1019, 34 L.Ed. 408. Light is thrown upon the defendant's own understanding of the contract by the fact that when notified of the abandonment of the vessel, they made no claim that loss occurred from a cause not insured against, but wrote to the plaintiff that their policies 'were rescinded and voided by the unseaworthiness of said vessel which caused her loss.' "

Aetna Ins. Co. v. Sacramento-Stockton S.S. Co., 273 F. 55 at 58 (CA9, 1921).

On the basis of the contract of insurance in effect it is submitted that summary judgment should be granted as requested by Appellant.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

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Attorneys for Appellant

No. 22243

IN THE

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

PACIFIC INLAND NAVIGATION CO., *Appellant*

vs.

FIREMEN'S FUND INSURANCE COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

JURISDICTION

The basis of jurisdiction is set out in Appellant's Brief (Brief of Appellant, pp. 1-2).

STATEMENT OF THE CASE

Appellee is furnishing a Statement of the Case because appellant's statement begins by begging the question which is being appealed and omits some of the pertinent facts.

Because Friedolf Humpla was on navigable waters and in the employ of Pacific Inland Navigation Co., Inc., when he was injured on September 27, 1964, appellee paid $5,343.84 to him by way of benefits under the Longshoremen's and Harbor Workers' Act in accordance with Policy No. LS-1214, a copy of which is attached (Tr. 14 and Ex. A-1 attached thereto).

Pacific Inland Navigation Co. owned the barge upon which Humpla was injured, and he sued that corporation in the Circuit Court of the State of Oregon under the doctrine of *Reed v. SS YAKA,* 373 U.S. 410, 10 L.Ed.2d 448, 83 S.Ct. 1349 (1963) Tr. 5). That suit was defended by appellant's Protection and Indemnity insurer (hereinafter referred to as P&I) because it insured the barge. The lawsuit was settled by a $30,000.00 contribution from the P&I underwriter and a waiver of the lien granted the compensation underwriter (appellee herein) by the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901, *et seq* (Tr. Ex. A-1 at Pg. 14). As Exhibit A-1 states, the contributions toward settlement were made without prejudice to either party's position that it did not cover the lawsuit by Humpla.

Thereafter, this lawsuit was brought, claiming coverage by appellee under compensation policy LS-1214, Paragraph One(b) (Tr. 3). Appellee denied coverage, and counter-claimed for its lien, on the basis of the Endorsement Restricting Policy Coverage (endorsement No. 2) to policy LS-1214 (Tr. 14, 15), and on the basis that the Humpla lawsuit was not within the scope of One(b) in any event because it was a shipowner's liability, not an employer's liability.

Motions for Summary Judgment were filed by both parties, based solely on the pleadings and the compensation policy No. LS-1214 (Tr. 19, 29; Briefs at Tr. 20, 31, 37). Summary judgment was entered in favor of appellee (Tr. 45, 46).

SUMMARY OF ARGUMENT

THE ISSUE: Appellee's position is that policy LS-1214 (attached) is a compensation policy providing only coverage under the Longshoremen's and Harbor Workers' Act and $100,000.00 liability coverage in the event the Longshore Act is declared unconstitutional, which has not occurred. Appellant's position is that endorsement No. 2 does not exclude coverage One(b) (Employer's Liability) but relates only to One(A) (Compensation) and that the Humpla loss is covered under One(B).

Appellee will develop the following arguments supporting its position:

I. Policy LS-1214 covers only Longshoremen's and Harbor Workers' Act benefits. That is what the policy says, both by the ordinary meaning of its terms, particularly Endorsement Restricting Policy Coverage (endorsement No. 2) (". . . . no other liability of any nature whatsoever, ... is covered hereunder") and by the entirety of the agreement which, from the declarations page to the endorsements, is framed solely in terms of Longshore Act coverage.

II. Even assuming endorsement No. 2 did not exist, policy LS-1214 would not cover the Humpla lawsuit because liability to Humpla is a risk of a shipowner, not an employer. There is no dispute that the policy would not cover a suit by a longshoreman employed by a third party, a suit by a stevedore employer for indemnity, a suit by anyone if injured ashore, a suit by a crew member, or compensation under a state act for an injury occurring to an employee ashore. Since Humpla, by his lawsuit, sought to equate himself with a

longshoreman employed by a third party, his suit is similarly not a risk covered by this policy.

ARGUMENT

I.

Policy LS-1214 Covers Only Longshoremen's and Harbor Workers' Act Benefits.

A reading of the whole of policy LS-1214 plainly shows that it is a compensation policy providing coverage for liabilities arising under the Longshoremen's and Harbor Workers' Act and providing $100,000.00 liability coverage in the event the Longshore Act is declared unconstitutional. A case cited numerous times in Appellant's Brief, *Safeco Ins. Co. of America v. McManemy,* 72 W.D.2d 2112, 432 P.2d 537 (1967), states the first of "the general principles to be followed in construing insurance contracts" to be:

> "(1) The terms of the insurance policy must be given their usual, popular and ordinary meaning unless the entirety of the agreement clearly demonstrates a contrary intent." (Citations omitted) 72 W.D.2d at 213.

Policy LS-1214 is only a compensation policy *both* by the "usual, popular and ordinary meaning" of its terms *and* by the "entirety" of the agreement." We will now explore those two aspects of the policy.

A. *The Ordinary Meaning of Policy LS-1214*

The language of policy LS-1214 states plainly, expressly, explicitly and without ambiguity that it covers liability of the assured under the Longshoremen's and Harbor Workers' Compensation Act and does not cover any other liability of the assured.

The agreement begins by stating that Fireman's Fund Insurance Company "does hereby agree with this employer, named and described as such in the declarations forming a part hereof, as respects personal injuries sustained by employees, including death at any time resulting therefrom, as follows:" That opening phraseology eliminates coverage of many losses similar to the *Humpla* suit, and, indeed, those which gave historical birth to liabilities such as the *Humpla* suit. It is obvious that the policy does not cover a lawsuit brought by a longshoreman employed by an independent stevedore company and injured aboard appellant's barge. Nor does it cover suits by any other person not an employee of the assured. It would not cover an independnt stevedore company's suit for indemnity under *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1955).

Coverage One(a) (entitled in the margin, "Compensation") then provides coverage for benefits under Workmen's Compensation statutes "cited and described in an Endorsement attached to this policy" and further provides that "nothing herein contained shall operate to so extend this policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an Endorsement hereto attached." By the plain meaning of its words, One(a) requires an endorsement to include coverage for the Longshore Act. Endorsement No. 1 does include that coverage. (Endorsement No. 1 states, "the obligations of Coverage A of the Policy include the" Longshoremen's Act.) It is inclusive, and not restrictive in nature. Presumably, other Workmen's Compensation Acts could be added by further endorsement.

Coverage One(b) (entitled, "Liability for Damages") states that the insurer will indemnify the employer against loss because of liability to employees for injuries. It needs no endorsement to be effective, such as One(a) needs. Nonetheless, there is an endorsement pertaining to One(b) and excluding its coverage from the policy.

> *"Endorsement Restricting Policy Coverage No. 2.*
>
> The obligation of Paragraph One(a) of the policy to which this endorsement is attached shall cover only the Workmen's Compensation Law hereinafter cited and described and none other:
>
> *'Longshoremen's and Harbor Workers' Compensation Act'* (Public Act No. 803—69th Congress).
>
> It is mutually understood and agreed that except as this policy may be otherwise extended by endorsement, no other liability of any nature whatsoever, except as defined by the said 'Longshoremen's and Harbor Workers' Compensation Act,' is covered hereunder.
>
> It is understood and agreed, however, that the above will not operate to exclude liability under clause No. 1-B of the policy in respect to those employees to which the Federal Longshoremen's and Harbor Workers' Compensation Act should be declared in whole or in part unconstitutional."

The "usual, popular and ordinary meaning" of the plain language of that endorsement limits the policy coverage to Longshore Act benefits only. By its very title, the endorsement restricts the coverage of the *entire* policy.

The first paragraph limits One(a) to the Longshore Act.

The second paragraph excludes all coverage except the Longshore Act, and therefore One(b) is expressly excluded. That the second paragraph excludes the coverage of One(b) is confirmed by the fact that the third paragraph replaces One(b) into the policy if the Longshore Act is declared unconstitutional. Not only has the Longshore Act not been declared unconstitutional, but its constitutionality has been affirmatively upheld. *Crowell v. Benson,* 285 U.S. 22, 52 S.Ct. 285, 76 L.Ed. 598 (1932).

The heart of endorsement No. 2 is the plain language of the second paragraph, ". . . .*no other liability* of any nature whatsoever, except as defined by the" Longshore Act, "is covered hereunder". Unless that language of the endorsement restricts the coverage of the entire policy by excluding One(b), the endorsement is superfluous. Appellant's Brief (Pg. 10; cites the rule that each part of the policy should be construed "so that all parts thereof shall have some effect". *Safeco Ins. Co. of America v. McManemy, supra,* at Page 214. Yet, appellant asserts that endorsement No. 2 is attached only "to particularly describe the precise Workmen's Compensation Law intended," (*Brief of Appellant,* Pg. 13) a function which was already accomplished by endorsement No. 1. In order to give effect to endorsement No. 2, it must be read as appellee reads it.

Nor are appellee and Judge Boldt alone in so reading the policy. Judge Frank D. James, in the Superior Court of the State of Washington for King County, was faced with the identical issue in *Insurance Co. of North America v. Fireman's Fund Ins. Co.,* King County Cause No. 669599, and entered the following Conclusions of Law:

"II. As the INA Protection and Indemnity

Policy covers the *Anderson* case in the first instance, the sole issue for decision in this cause is whether the Fireman's Fund policy LS-1215 provides other insurance.

III. Fireman's Fund policy LS-1215 as endorsed is clear and unambiguous and requires no interpretive evidence or application of rules as to construction. Endorsement No. 4 deletes Clause 1-B from the policy except if the Longshoremen's and Harbor Workers' Act is declared unconstitutional or except where 1-B coverage is added by special endorsement.

IV. Fireman's Fund policy LS-1215 does not provide insurance coverage against risks such as the *Lee Anderson* case, i.e., cases arising under the doctrine of *Reed v. SS YAKA,* 373 U.S. 410, 10 L.Ed.2d 449 (1963)."

A Judgment of Dismissal was entered 8 September, 1967.

The ordinary meaning of the terms of policy LS-1214 dictates that the judgment of the trial court must be affirmed.

B. ***The Entirety of the Agreement***

The Endorsement Restricting Policy Coverage (No. 2) and its meaning fit perfectly into the overall pattern of Policy LS-1214 as an agreement providing coverage of compensation benefits only. A reading of the terms of the entire policy confirms this.

As stated by the Washington court in *Safeco Ins. Co. of America v. McManemy,* supra, at Pg. 214: "To properly interpret the policy, one must start with the declarations". Turning to the Declarations page, we see that, Item 3, the Covered Locations are:

> *"Territorial waters* of the States of California, Oregon, Washington and Alaska." (Emphasis supplied)

It should be borne in mind that Section 3 of the Longshore Act brings within the purview of theAct only those injuries ". . . . occurring upon the navigable waters of the United States (including any drydock) . . . ." 33 U.S.C. 903. For the classification of operations on those waters which are covered, the Declarations page refers the reader to the "Schedule of Operations" found on Endorsement No. 6. By the terms of both Endorsement No. 6 and the Declarations page, the purpose of scheduling these operations is to classify the activities so that premium rates can be established, based on a dollar value per hundred dollars of payroll. Thus, "Stevedoring, N.O.C." (Not Otherwise Classified) is covered in all four states while ship repair activities are covered in Oregon and Washington. Should any employee of the assured involved in any operation so named be injured on navigable waters, even though his presence there is only incidental to his principal duties, the assured is covered for compensation by policy LS-1214 as required by the Longshore Act. 33 U.S.C. 938.

Appellant's Brief refers to some of the operations listed in Endorsement No. 6 as being "without the coverage" of the Longshore Act. Yet all the operations shown are on the waterfront with the inherent risk that an employee might be injured on navigable water, be he chauffeur, yard worker or longshoreman. The necessity of coverage of such employees under the Longshore Act was thoroughly reviewed in Note, *The Oregon Employers' Liability Law and The Federal Overlap,* I Willamette Law Journal 77 (1959):

> "The only way that an employer can protect himself when he employs maritime workers is

to be covered under both acts, state and Federal." (At Pg. 90)

The compensation situation in Oregon at the time of Mr. Humpla's accident was as outlined in the article. An example of Longshore Act coverage of such operations by this employer is *Pacific Inland Navigation Co. v. Course,* 368 F.2d 540 (C.C.A. 9, 1966), involving a harbor worker in appellant's yard and which stated, "The worker was covered by the Longshoremen's and Harbor Workers' Compensation Act, ..."

Thus, One(a) with Endorsement No. 1 provides coverage for benefits under the Longshore Act. One(b), Liability for Damages, is excluded by Endorsement Restricting Policy Coverage (endorsement No. 2) unless the Longshore Act is declared unconstitutional.

In the event of a declaration of unconstitutionality of the Longshore Act, One(B) would come into play to protect the assured, but the policy limits must be defined. Endorsement No. 4 does that. It is entitled, "Limitation of Liability Endorsement Paragraph One(b)" and states that liability under Paragraph One(b) is limited to $100,000.00. Nowhere does that endorsement extend One(b) coverage beyond the limitations placed on it by endorsement No. 2. In fact, endorsement No. 4 states: "All other terms and conditions remain unchanged".

Appellant's argument (*Brief of Appellant,* Pg. 16) regarding Paragraphs Two, Three and Four is irrelevant, because appellant seeks only to enforce One(b); and is erroneous because Two, Three and Four are services ancillary to One(a) as well as

One(b). There is only One(a) coverage under LS-1214 because of restrictive endorsement No. 2.

Further, Appellant's Brief (Pg. 16) states that a premium was charged for One(b) coverage. Not only is there no evidence below to support that statement, but the statement is false. The premium rates were based only on coverage for compensation under the Longshore Act.

Appellant's Brief, while arguing against the express meaning of endorsement No. 2 as read by appellee, a District Court Judge, and a Washington Superior Court Judge, offers no substitute meaning other than that it is the same as endorsement No. 1 (Pg. 13) and thereby urges violation of the rule it asserted on Page 10 that all parts of the contract shall have some effect. A summary of appellant's argument would appear to be that it believes endorsement No. 2 to be ambiguous and that summary judgment should therefore be granted in appellant's favor without parole evidence on the intent of the parties, in spite of the rule to the contrary as enunciated in *Boeing Airplane Co. v. Fireman's Fund Indemnity Co.,* 44 Wn.2d 488 at 496. However, even if appellant should urge remand, this court can dispose of this cumberson litigation and avoid further expense by deciding a controlling question of law as did the trial court.

A reading of the whole of policy LS-1214 plainly shows that it is a compensation policy providing coverage for liabilities arising under the Longshoremen's and Harbor Workers' Act and providing $100,000.00 liability coverage in the event the Longshore Act is declared unconstitutional, which has not occurred. The entirety of the agreement dictates

that the judgment of the trial court must be affirmed.

II.

The Humpla Lawsuit Was Not an Employer's Liability.

For purposes of Part II of this Argument, it can be assumed that the Endorsement Restricting Policy Coverage (endorsement No. 2) was never written or made a part of policy LS-1214 because it will be shown that, even without endorsement No. 2, the lawsuit brought by Mr. Humpla and the settlement of it does not fall within Coverage One(b) of the policy.

The *Humpla* lawsuit was not an action against his employer, but against the owner of the barge on which he was injured. That fact is borne out by the history of the *Humpla* cause of action, the theory of the cause of action, and the very wording of the Complaint. The *Humpla* Complaint never even mentioned that appellant was his employer (Tr. 5-9). Appellee's denial of coverage is not based merely on the wording of the Complaint, however. It is also based on the nature and history of the *Humpla* cause of action.

One(b) of policy LS 1214 would cover none of the historical antecedents which developed the theory of and provide the authority for the *Humpla* suit:

(1) *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099, 66 S.Ct. 872(1946), would have been the authority for Humpla's suing appellant as the barge owner if he were employed by an independent stevedore company. That lawsuit would not have been covered by employer's liability insurance, because he would not have been

an employee. Rather, it would have been covered by the barge's insurance, presumably P&I.

(2) *Ryan Stevedoring Co. v. Pan-Atlantic Steamship Corp.,* 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133 (1955), would authorize a lawsuit by the barge owner against appellant, as the stevedore employer of Humpla, for indemnity to the barge owner for its liability to Humpla, if the barge were separately owned. Such a liability of an employer of longshoremen was held to fall within its general or public liability policy rather than its employer's liability policy by the trial court, and affirmed by this court, in *Indemnity Ins. Co. v. California Stevedore & Ballast Co.,* (C.C.A. 9, 1962), 307 F.2d 513:

> "The subject with which Exclusion (c) is concerned is Workmen's Compensation or Employer's Liability, or, perhaps, both. The shipowners' claims in the case at bar dealt with neither."

Similarly, Coverage One(b) of policy LS-1214 is only employer's liability, and would not cover such a lawsuit, which presumably would fall within the coverage of appellant's public liability or general liability policy.

(3) *Reed v. SS YAKA,* 373 U.S. 410, 10 L.Ed.2d 448, 83 S.Ct. 1349 (1963), put the harbor worker employed by the vessel owner, e.g., Mr. Humpla, in the same position as *Sieracki* through the reasoning of *Ryan.*

> "Thus, there can be no doubt that, if the petitioner here had been employed to do this particular work by an independent stevedoring company rather than directly by the owner, he could have recovered damages for his injury

from the owner who could have then under Ryan shifted the burden of the recovery to petitioner's stevedoring employer." (At Page 414)

"We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for a stevedoring company." (At Page 415)

Hence, it follows that Paragraph One(b), Employer's Liability, of LS-1214 would not cover the *YAKA* situation, which would be covered by the same policy as *Sieracki*: the P&I insurance on the vessel.

The split of insurance coverage in the *YAKA* situation was recognized in *White v. United States Lines,* (D.C. Md., 1965), 254 F.Supp. 480 at 482, holding a suit by a longshoreman injured before the *YAKA* decision to be barred by laches where the prejudice necessary to laches was found in the fact that compensation insurance did not cover lawsuits for unseaworthiness and, understandably, the insurance carrier covering the suit did not recognize the risk and investigate the accident.

The accuracy of the whole analysis that the *YAKA* is the shipowner's liability rather than an employer's liability was confirmed by the Supreme Court in *Jackson v. Lykes Bros. SS Co.,* 386 U.S. 731, 18 L.Ed.2d 488, 87 S.Ct. 1419 (1967). The Supreme Court held that, because of *Sieracki, Ryan,*

and *YAKA,* a longshoreman could sue the vessel owner *in personam* in state court, in spite of the facts that the Longshore Act protected the employer from such a suit, and the owner and employer were the same person.

> "We held in *Yaka* that a longshoreman employed by a shipowner as a longshoreman could sue the owner for the ship's unseaworthiness." (At 386 U.S....., 18 L.Ed.2d 980)
>
> "In this case as in *Yaka,* the fact that the longshoreman was hired directly by the owner instead of by the independent stevedoring company makes no difference as to the *liability of the ship or its owner."* (At 386 U.S. ....., 18 L.Ed.2d 491). (Emphasis supplied)

Consequently, Humpla's Complaint was proper when it alleged unseaworthiness against appellant herein because it owned the barge on which Humpla was injured, and when it failed to mention that appellant herein was Humpla's employer, because that fact was totally irrelevant to Humpla's cause of action.

The lawsuit of Humpla was therefore a "liability of the ship or its owner" and within the coverage of the insurance on the barge. Humpla's injury was not an employer's liability beyond the provisions of the Longshore Act, and was not therefore covered by One(b) of policy LS-1214 (still assuming that Endorsement Restricting Policy Coverage [endorsement No. 2] did not exist). If appellant had not owned the barge, Humpla could not even have brought a lawsuit against appellant because of the immunity provision of the Longshore Act, as was held recently by the Fifth Circuit in *Watson v. Gulf Stevedoring Corp.* (C.C.A. 5, 1967), 374 F.2d 946,

cert. denied November 6, 1967, No. 472, ...U.S....., 19 L.Ed.2d 277.

Since any liability to Humpla was not that of appellant as an employer, coverage for that liability should not fall within Employer's Liability, One(b) of policy LS-1214, but rather within the P&I insurance on the barge.

CONCLUSION

Fireman's Fund policy No. LS-1214, by its unambiguous terms, excluded coverage of all liability but that for Longshore Act benefits, which were paid by appellee. Endorsement Restricting Policy Coverage (endorsement No. 2) clearly spells that out.

Additionally, One(b) of the policy covers only Employer's Liability in any event. Liability to Humpla was not that of employer but of shipowner, and therefore within the coverage of the P&I insurance, not appellee's compensation policy.

The judgment below is proper and should be affirmed.

Respectfully submitted,

BOGLE, GATES, DOBRIN,
WAKEFIELD & LONG
THOMAS J. MCKEY
Attorneys for Appellee

CERTIFICATE

We certify that, in connection with the preparation of this brief, we have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and in our opinion, the foregoing brief is in full compliance with those rules.

THOMAS J. McKEY

Of Attorneys for Appellee.

FEDERAL LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ENDORSEMENT

No. 1

The obligations of Coverage A of the Policy include the

Longshoremen's and Harbor Workers' Compensation Act being Public Act No. 803 of the 69th Congress, approved March 4, 1927,

and all laws amendatory thereof or supplementary thereto which may be or become effective while this Policy is in force.

The Company will carry out the provisions of section 35 of said Act. Insolvency or bankruptcy of the Employer and/or discharge therein shall not relieve the Company from payment of compensation and other benefits lawfully due for disability or death sustained by any employee during the life of the Policy.

The Company agrees to abide by all the provisions of this Act and all lawful rules, regulations, orders, and decisions of the United States Employees' Compensation Commission and of the Deputy Commissioner having jurisdiction, unless and until set aside, modified, or reversed by a court having jurisdiction of the parties and the subject matter.

If this Employer is a contractor the subject of whose contract includes operations covered by this Policy and he shall sub-contract all or any part of such contract to one or more sub-contractors, the remuneration of all the direct employees of all such sub-contractors shall be included in the return of remuneration under the provisions of this Policy upon which premium is computed. Such remuneration so reported shall be considered the remuneration of employees of this Employer and shall in all instances be governed by the same terms, conditions, requirements, and obligations of the Policy as the remuneration of the direct employees of this Employer. The requirements of this paragraph shall not apply as respects any such sub-contractor who has secured compensation for his direct employees as required by the Longshoremen's and Harbor Workers' Compensation Act, but this Employer shall not claim the benefit of this exemption unless and until he shall satisfy the Company by certificate or otherwise that any such sub-contractor has legally secured the payment of compensation to his own direct employees and then only respecting any sub-contractor who has furnished such proof.

This endorsement shall not be canceled prior to the date specified in this Policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the Commission, to the Deputy Commissioner, and to this Employer.

All terms, conditions, requirements and obligations expressed in this Policy or in any other endorsement attached thereto which are not inconsistent with or inapplicable to the provisions of this endorsement are hereby made a part of this endorsement as fully and completely as if wholly written herein.

The rates of premium are subject to change, if during the term of the Policy any amendments affecting the benefits provided by this Act become effective, such change, if any, to be expressed by an endorsement naming the effective date thereof.

This endorsement shall take effect June 1st 19 64, 12:01 A. M., standard time at the place where this Policy has been countersigned, and shall terminate simultaneously with this Policy.

Attached to and hereby made a part of Policy No. IS-1214 of FIREMAN'S FUND INSURANCE COMPANY issued to PACIFIC ISLAND NAVIGATION COMPANY, INC., etal

Countersigned at Portland, Oregon this 27th day of May, 19 64

Authorized Agent.

Jack R. McGowan SECRETARY

COPY

M-MO 60 6-58 (formerly M 5528)

ENDORSEMENT RESTRICTING POLICY COVERAGE

No. 2

The obligation of Paragraph One (a) of the policy to which this endorsement is attached shall cover only the Workmen's Compensation Law hereinafter cited and described and none other:

"LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT"
(Public Act No. 803 — 69th Congress)

It is mutually understood and agreed that except as this policy may be otherwise extended by endorsement, no other liability of any nature whatsoever, except as defined by the said Longshoremen's and Harbor Workers' Compensation Act, is covered hereunder.

It is understood and agreed, however, that the above will not operate to exclude liability under clause No. 1-B of the policy in respect to those employees to which the Federal Longshoremen's and Harbor Workers' Compensation Act applies if said Federal Longshoremen's and Harbor Workers' Compensation Act should be declared in whole or in part unconstitutional.

This endorsement shall form a part of and be subject to all the terms, conditions and agreements of Policy No.

L. S. 1214 issued by the Fireman's Fund Insurance Company to

PACIFIC INLAND NAVIGATION COMPANY, INC., etal

and becomes effective on the 1st day of June 19 64, 12:01 A. M., standard time, but shall not be valid or binding upon the Company unless and until it is countersigned by a duly authorized Agent of the Company.

Jack R McGowan
SECRETARY

Fred H Merrill
PRESIDENT

Countersigned at Portland, Oregon this 27th day of May, 19 64

M-MO 81 6-63

COPY

Authorized Agent

ENDORSEMENT

The FUND Insurance Companies

FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

No. 3

$_____
Additional Premium

$_____
Return Premium

In consideration of the Agreed Premium at which this Policy is written, it is hereby ordered and agreed that at the end of the period of three (3) months and at the end of each subsequent period of the same duration, the Insured shall furnish the Company with a statement of the amount of remuneration earned during the period by the employees, and shall pay to the Company a premium computed at the rate or rates set forth in the Policy. The amount now to be retained by the Company under the provisions of the Policy and to apply against the earned premium for the first period.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

_____
SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

POLICY NO. _____ EFFECTIVE DATE _____ INSURED _____

MS 105D 7-61 ®

COPY

PRINTED IN U. S. A.

ENDORSEMENT

The FUND Insurance Companies

FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

No. 4

$_____ Additional Premium

EXCLUSION OF EMPLOYERS LIABILITY (B)

$_____ Return Premium

It is understood and agreed that anything in this policy or endorsement thereto to the contrary notwithstanding, the Company's liability under Paragraph (a) (Employers' Liability for damages other than Workmen's Compensation) is limited to $10,000. for all damages arising out of injury to or death of one or more employees in any one accident. A series of injuries arising out of the same event shall be considered as one accident.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

POLICY NO. EFFECTIVE DATE INSURED

MS 105D 7-61 ®

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PRINTED IN U. S. A.

ENDORSEMENT

The FUND Insurance Companies

FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

No. 5

$_____
Additional Premium

$_____
Return Premium

It is understood and agreed that in the event the United States Employeremen's and Harbor Worker's Compensation Act is amended, the rates per $100.- of remuneration as set forth in the below numbered policy shall be subject to revision by agreement.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

POLICY NO. [illegible] EFFECTIVE DATE June 1, 1961 INSURED [illegible]

MS 105D 7-61 ®

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CORRECTED

ENDORSEMENT

No. 6

The FUND Insurance Companies
FIREMEN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

$ ..... Additional Premium

SCHEDULE OF OPERATIONS

$ ..... Return Premium

Pursuant to the terms and requirements of the policy to which this endorsement is attached, the classifications and premium rates per $100.- of remuneration, as mentioned in Item 3 of the Declarations, shall be as follows:

Code	Classifications	Rate
	OREGON AND WASHINGTON	
7309	Shiprepair or Conversion - all operations including ship or yard; the operations of dry dock marine railways; Drivers, Chauffeurs and their Helpers.	11.25
7309	Stevedoring, N.O.C.	11.25
	ALASKA	
7309	Stevedoring, N.O.C.	13.03
	CALIFORNIA	
7309	Stevedoring, N.O.C. (total on and offshore payroll)	4.70

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions, agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

..... SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

IS-1214 POLICY NO. June 1, 1964 DATE PACIFIC INLAND NAVIGATION COMPANY, INC., et al

ENDORSEMENT

No. 7

The FUND Insurance Companies

FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

$_____ Additional Premium

$_____ Return Premium

It is understood and agreed that in the event of cancellation of the within policy, ten (10) days' written notice will be given to:

[illegible]
United States Army
Atlanta Support Command and Fort Mathenson
Director of Supply and Procurement
Procurement Division
APO 343, U.S. Forces

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

_____
SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

POLICY NO. _____ EFFECTIVE DATE _____ INSURED _____

MS 105D 7-61 ®

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ENDORSEMENT

The FUND
Insurance Companies
FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

No. 5

$_____
Additional Premium

$_____
Return Premium

It is understood and agreed that in the event of cancellation of the within policy, ten (10) days' written notice will be given to:

The American Petroleum Corporation
Anchorage, Alaska

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

_____
SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

POLICY NO. _____ EFFECTIVE DATE _____ INSURED _____

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ENDORSEMENT

The FUND
Insurance Companies
FIREMAN'S FUND INSURANCE COMPANY
HOME FIRE & MARINE INSURANCE COMPANY
NATIONAL SURETY CORPORATION

No. 9

$_____
Additional Premium

$_____
Return Premium

It is understood and agreed that in the event of cancellation of the within policy, thirty (30) days' written notice will be given to:

Dept. of the Army
U.S. Naval Supply Depot
Mechanicsburg, Pennsylvania
Attn: Fiscal Officer, Contract Section

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

_____
SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

POLICY NO. _____ EFFECTIVE DATE _____ INSURED _____

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ENDORSEMENT

No. 10

$_____ Additional Premium

$_____ Return Premium

It is understood and agreed that the following named employers are added as additional insureds as a joint venture for the period of the 1964 Dew Line operation:

Puget Sound Tug & Barge Company, United Transportation Company and Alaska Barge and Transport, Inc. d/b/a/ Alaska Puget United Transportation Company, a Joint Venture.

Nothing herein contained shall be held to vary, waive, alter or extend any of the terms, conditions agreements or declarations of the undermentioned Policy other than as above stated.

All other terms and conditions remain unchanged.

_____
SIGNATURE OF AUTHORIZED AGENT

THE FOLLOWING SPACES MUST BE COMPLETED ONLY IF THIS ENDORSEMENT IS NOT ATTACHED TO THE POLICY WHEN ISSUED.

LS-1214	June 1, 1964	PACIFIC INLAND NAVIGATION COMPANY, INC., etal
POLICY NO.	EFFECTIVE DATE	INSURED

MS 105D 7-61 ®

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COPY

Vacuum Cleaner No. 3
6/1/64 - 6/1/65

No. LS-1214

FIREMAN'S FUND INSURANCE COMPANY

HOME OFFICE
SAN FRANCISCO

(Hereinafter called the Company)

Does Hereby Agree WITH THIS EMPLOYER, NAMED AND DESCRIBED AS SUCH IN THE DECLARATIONS FORMING A PART HEREOF, AS RESPECTS PERSONAL INJURIES SUSTAINED BY EMPLOYEES, INCLUDING DEATH AT ANY TIME RESULTING THEREFROM, AS FOLLOWS:

Compensation

ONE. (a) TO PAY PROMPTLY to any person entitled thereto, under the Workmen's Compensation Law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due,

(1) To such person because of the obligation for compensation for any such injury imposed upon or accepted by this employer under such of certain statutes as may be applicable thereto, cited and described in an endorsement attached to this policy, each of which statutes is herein referred to as the Workmen's Compensation Law, and

(2) For the benefit of such person the proper cost of whatever medical, surgical, nurse, or hospital services, medical or surgical apparatus or appliances and medicines, or, in the event of fatal injury, whatever funeral expenses are required by the provisions of such Workmen's Compensation Law.

It is agreed that all the provisions of each Workmen's Compensation Law covered hereby shall be and remain a part of this contract as fully and completely as if written herein, so far as they apply to compensation or other benefits for any personal injury or death covered by this policy, while this policy shall remain in force. Nothing herein contained shall operate to so extend this policy as to include within its terms any Workmen's Compensation Law, scheme or plan not cited in an endorsement hereto attached.

Liability For Damages

ONE. (b) TO INDEMNIFY this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada. In the event of the bankruptcy or insolvency of this employer the company shall not be relieved from the payment of such indemnity hereunder as would have been payable but for such bankruptcy or insolvency. If, because of such bankruptcy or insolvency, an execution against this employer is returned unsatisfied in an action brought by the injured, or by another person claiming by, through or under the injured, then an action may be maintained by the injured, or by such other person claiming by, through or under the injured, against the company under the terms of this policy for the amount of the judgment in said action not exceeding the amount of this policy.

Inspection Service

TWO. TO SERVE this employer (a) by the inspection of work places covered by the policy when and as deemed desirable by the company and thereupon to suggest to this employer such changes or improvements as may operate to reduce the number or severity of injuries during work, and (b), upon notice of such injuries, by investigation thereof and by settlement of any resulting claims in accordance with law.

Defense

THREE. TO DEFEND, in the name and on behalf of this employer, any suits or other proceedings which may at any time be instituted against him on account of such injuries, including suits or other proceedings alleging such injuries and demanding damages or compensation therefor, although such suits, other proceedings, allegations or demands are wholly groundless, false or fraudulent.

Costs and Expenses

FOUR. TO PAY all costs taxed against this employer in any legal proceedings defended by the company, all interest accruing after entry of judgment and all expenses incurred by the company for investigation, negotiation or defense.

Employees Covered

FIVE. THIS AGREEMENT SHALL APPLY to such injuries sustained by any person or persons employed by this employer whose entire remuneration shall be included in the total actual remuneration for which provision is hereinafter made, upon which remuneration the premium for this policy is to be computed and adjusted, and also to such injuries so sustained by the president, any vice-president, secretary, or treasurer of this employer, if a corporation. The remuneration of any such designated officer shall not be subjected to a premium charge unless he is actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman.

Injuries Covered

SIX. THIS AGREEMENT SHALL APPLY to such injuries so sustained by reason of the business operations described in said declarations which, for the purpose of this insurance, shall include all operations necessary, incident or appurtenant thereto, or connected therewith, whether such operations are conducted at the work places defined and described in said declarations or elsewhere in connection with, or in relation to, such work places.

Policy Period

SEVEN. THIS AGREEMENT SHALL APPLY ONLY to such injuries so sustained by reason of accidents occurring during the policy period limited and defined as such in *Item* 2 of said declarations.

THIS AGREEMENT IS SUBJECT TO THE FOLLOWING CONDITIONS:

Basis of Premium

A. The premium is based upon the entire remuneration earned, during the policy period, by all employees of this employer engaged in the business operations described in said declarations, together with all operations necessary, incident or appurtenant thereto, or connected therewith whether conducted at such work places or elsewhere in connection therewith or in relation thereto; excepting however the remuneration of the president, any vice-president, secretary or treasurer of this employer, if a corporation, but including the remuneration of any one or more of such designated officers who are actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman. If any operations as above defined are undertaken by this employer but are not described or rated in said declarations, this employer agrees to pay the premium thereon, at

the time of the final adjustment of the premium in accordance with *Condition* C hereof, at the rates, and in compliance with the rules, of the Manual of Rates in use by the company upon the date of issue of this policy. At the end of the policy period the actual amount of the remuneration earned by employees during such period shall be exhibited to the company, as provided in *Condition* C hereof, and the earned premium adjusted in accordance therewith at the rates and under the conditions herein specified. If the earned premium, thus computed, is greater than the advance premium paid, this employer shall immediately pay the additional amount to the company; if less, the company shall return to this employer the unearned portion, but in any event the company shall retain the minimum premium stated in said declarations. All premiums provided by this policy, or by any endorsement hereon, shall be fully earned whether any such Workmen's Compensation Law, or any part of such, is now or shall hereafter be declared invalid or unconstitutional.

Adjustment of Premium

Cancellation

B. This policy may be cancelled at any time by either of the parties upon written notice to the other party stating when, not less than ten days thereafter, cancellation shall be effective. The effective date of such cancellation shall then be the end of the policy period. The law of any state, in which this policy applies, which requires that notice of cancellation shall be given to any board, commission or other state agency is hereby made a part of this policy and cancellation in such state shall not be effective except in compliance with such law. The remuneration of employees for the policy period stated in said declarations shall be computed upon the basis of the actual remuneration to the date of cancellation determined as herein provided. If such cancellation is at the company's request, the earned premium shall be adjusted *pro rata* as provided in *Condition A*. If such cancellation is at this employer's request, the earned premium shall be computed and adjusted at short rates, in accordance with the table printed hereon, but such short rate premium shall be not less than the minimum premium stated in said declarations. If this employer when requesting cancellation is actually retiring from the business herein described, then the earned premium shall be computed and adjusted *pro rata*. Notice of cancellation shall be served upon this employer as the law requires, but, if no different requirement, notice mailed to the address of this employer herein given shall be a sufficient notice, and the check of the company, similarly mailed, a sufficient tender of any unearned premium.

Inspection and Audit

C. The company shall be permitted, at all reasonable times, during the policy period, to inspect the plants, works, machinery and appliances covered by this policy, and to examine this employer's books at any time during the policy period, and any extension thereof, and within one year after its final expiration, so far as they relate to the remuneration earned by any employees of this employer while this policy was in force.

Company Directly Liable to Employee

D. The obligations of *Paragraph* ONE *(a)* foregoing are hereby declared to be the direct obligations and promises of the company to any injured employee covered hereby, or, in the event of his death, to his dependents; and to each such employee or such dependent the company is hereby made directly and primarily liable under said obligations and promises. This contract is made for the benefit of such employees or such dependents and is enforceable against the company, by any such employee or such dependent in his name or on his behalf, at any time and in any manner permitted by law, whether claims or proceedings are brought against the company alone or jointly with this employer. If the law of any state in which the policy is applicable provides for the enforcement of the rights of such employees or such dependents by any commission, board or other state agency for the benefit of such employees or such dependents, then the provisions of such law are made a part hereof, as respects any matter subject thereto, as fully as if written herein. The obligations and promises of the company as set forth in this paragraph shall not be affected by the failure of this employer to do or refrain from doing any act required by the policy; nor by any default of this employer after the accident in the payment of premiums or in the giving of any notice required by the policy or otherwise; nor by the death, insolvency, bankruptcy, legal incapacity or inability of this employer, nor by any proceeding against him as a result of which the conduct of this employer's business may be and continue to be in charge of an executor, administrator, receiver, trustee, assignee, or other person.

Knowledge and Jurisdiction of Employer Deemed Knowledge and Jurisdiction of Company

E. As between the employee and the company, notice to or knowledge of this employer of an injury or death covered hereby shall be notice or knowledge as the case may be of the company; the jurisdiction of this employer for the purposes of any Workmen's Compensation Law covered hereby shall be jurisdiction of the company and the company shall in all things be bound by and subject to the findings, judgments, awards, decrees, orders or decisions rendered against this employer in the form and manner provided by such laws and within the terms, limitations and provisions of this policy not inconsistent with such laws.

Notice to Company

F. This employer, upon the occurrence of an accident, shall give immediate written notice thereof to the company with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If, thereafter, any suit or other proceeding is instituted against this employer, he shall immediately forward to the company every summons, notice or other process served upon him. Nothing elsewhere contained in this policy shall relieve this employer of his obligations to the company with respect to notice as herein imposed upon him.

Action Against Company

G. No action shall lie against the company to recover upon any claim or for any loss under *Paragraph* ONE *(b)* foregoing unless brought after the amount of such claim or loss shall have been fixed and rendered certain either by final judgment against this employer after trial of the issue or by agreement between the parties with the written consent of the company, nor in any event unless brought within two years thereafter.

Specific Statutory Provisions

H. If the method of serving notice of cancellation, or the limit of time for notice of accident or for any legal proceeding herein contained is at variance with any specific statutory provision in relation thereto, in force in the state in which any of the business operations herein described are conducted, such specific statutory provision shall supersede any such condition in this contract inconsistent therewith.

Assignment

I. No assignment of interest under this policy shall bind the company unless the consent of the company shall be endorsed hereon.

Concurrent Insurance

J. If this employer carries any other insurance covering a claim covered by this policy, he shall not recover from the company a larger proportion of any such claim than the sum hereby insured bears to the whole amount of valid and collectible insurance.

Subrogation

K. The company shall be subrogated in case of any payment under this policy, to the extent of such payment, to all rights of recovery therefor vested by law either in this employer or in any employee or his dependents claiming hereunder, against persons, corporations, associations or estates.

Changes

L. No condition or provision of this policy shall be waived or altered except by endorsement attached hereto signed by the president or secretary of the company; nor shall notice to any agent, nor shall knowledge possessed by an agent, or by any other person, be held to effect a waiver or change in any part of this contract. Changes in the written portion of the Declarations forming part hereof (except Items 2, 3 and 4) may be made by the agent countersigning this policy, such changes to bind the company when initialed by such agent. The personal pronoun herein used to refer to this employer or to an injured employee or dependents, shall apply regardless of number or gender.

Declarations by Employer

M. The statements in *Items 1 to 6* inclusive, in the declarations hereinafter contained, are true; those stated as estimates only are believed to be true. This policy is issued upon such statements and in consideration of the provisions of the policy respecting its premium and the payment of the premium in such declarations expressed.

DECLARATIONS

Item 1. Name of employer [illegible]

P. O. address [illegible] see #10 for additional

For the purpose of serving notice, as in the policy provided, this employer agrees that this address may be considered as both the residence and business address of this employer or any representative upon whom notice may be served.

Individual, co-partnership, corporation, or estate? [illegible]

Item 2. The period during which the policy shall remain in force, unless cancelled as in the policy provided (herein called the policy period) shall be from the [illegible] day of [illegible] 19[illegible],

to the [illegible] day of [illegible] 19[illegible], at twelve and one minute o'clock a. m., standard time as to each of said dates at the place where any operation covered hereby is conducted, as respects that operation, or at the place where any injury covered hereby is sustained, as respects that injury.

Item 3. Locations of all factories, shops, yards, buildings, premises or other work places of this employer, by town or city, with street and number [illegible]

All business operations, including the operative management and superintendence thereof, conducted at or from the locations and premises defined above as declared in each instance by a disclosure of estimated remuneration of employees under such of the following Divisions as are undertaken by this employer.—1. All industrial operations upon the premises. 2. All office forces. 3. All repairs or alterations to premises. 4. Specially rated operations on the premises. 5. Operations not on the premises.

CLASSIFICATION OF OPERATIONS (NOTE: If more than one classification, indicate each other by (b), (c), (d), etc.)	Estimated Total Annual Remuneration	Rate per $100 of Remuneration	Deposit Premium
See "Schedule of Operations" attached			$5,000.-
2 (a) Clerical Office Employees 8810			
(b) Draughtsmen (engaged exclusively in the profession)—office duties only 8810			
3 New construction work by employees of this Employer only, classified as			
Note: Appropriate classifications must be entered above with estimated remuneration, rate and premium extension in each. Not available for contractors. Repairs and maintenance of this Employer's buildings and equipment when accomplished by his employees only are included in Division 1. New construction, repairs, and maintenance undertaken by contractors must be separately insured.			
4			
5 (a) Erection, installation, repair or demonstration of Employer's product, as follows:			
((Manual Classification))			
(b) Outside Salesmen, collectors and messengers (wherever engaged) who do not deliver merchandise 8742			
(c) Drivers and their Helpers, including stablemen—if not specifically included in Division 1 7205			
Chauffeurs and their Helpers—Commercial, including incidental garage employees—if not specifically included in Division 1 7380			
Minimum Premium for this Policy shall be $[illegible]		Deposit Premium	$ [illegible]

Item 4. The foregoing enumeration and description of employees include all persons employed in the service of this employer in connection with the business operations above described to whom remuneration of any nature in consideration of service is paid, allowed or due, together with an estimate for the policy period of all such remuneration. This enumeration and description with the estimated remuneration shall also include the president, any vice-president, secretary or treasurer of this employer if a corporation if actually performing such duties as are ordinarily undertaken by a superintendent, foreman or workman, but any such designated officer not so engaged shall not be included in such enumeration, description or estimated remuneration. The foregoing estimates of remuneration are offered for the purpose of computing the advance premium. The company shall be permitted to examine the books of this employer at any time during the policy period and any extension thereof and within one year after its final termination so far as they relate to the remuneration earned by any employees of this employer while the policy was in force.

Item 5. This employer is conducting no other business operations at this or any other location not herein disclosed—except as herein stated: Not Stated

Item 6. No similar insurance has been cancelled by any insurance carrier during the past year—except as herein stated: Not Stated

IN WITNESS WHEREOF, the FIREMAN'S FUND INSURANCE COMPANY has caused this policy to be signed by its duly authorized officers, at San Francisco, California, but the same shall not be binding upon the Company unless countersigned by a duly authorized agent of the Company.

Jack R. McGowan
SECRETARY

COPY

PRESIDENT

Countersigned at Portland, Oregon this 27th day of May 19[illegible]

Authorized Agent.

POLICY NO._____

FIREMAN'S FUND

INSURANCE COMPANY

HOME OFFICE
401 CALIFORNIA STREET
SAN FRANCISCO

Issued to

.....

Expires.....19.....

PLEASE READ YOUR POLICY

Carefully note condition requiring immediate notice of every loss.

M-250 8-52 ®

NOTICE

Don't fail to notify the home office of the company at San Francisco, Calif., or its duly authorized agent, of every accident, however slight, immediately upon its occurrence.

If accident is fatal or involves serious injury telegraph or telephone at company's expense, giving date of inquest if one is to be held.

Do not delay sending in notice because unable to give all information desired. Send a completed notice later.

SHORT PERIOD TABLE

FOR TERM OF ONE YEAR

Policy in Force	Per Cent. of Annual Prem.
1 day	2%
2 days	4%
3 days	5%
4 days	6%
5 days	7%
6 days	8%
7 days	9%
8 days	9%
9 days	10%
10 days	10%
11 days	11%
12 days	11%
13 days	12%
14 days	13%
15 days	13%
16 days	14%
17 days	15%
18 days	16%
19 days	16%
20 days	17%
25 days	19%
30 days or 1 month	20%
35 days	23%
40 days	25%
45 days	27%
50 days	28%
55 days	29%
60 days or 2 months	30%
65 days	33%
70 days	36%
75 days	37%
80 days	38%
85 days	39%
90 days or 3 months	40%
105 days	46%
120 days or 4 months	50%
135 days	50%
150 days or 5 months	60%
165 days	66%
180 days or 6 months	70%
195 days	73%
210 days or 7 months	75%
225 days	78%
240 days or 8 months	80%
255 days	83%
270 days or 9 months	85%
285 days	88%
300 days or 10 months	90%
315 days	93%
330 days or 11 months	95%
345 days	98%
360 days or 12 months	100%

No. 22343

In The

United States Court of Appeals

For The Ninth Circuit

Angus J. DePinto,
Appellant,

v.

Hjalmar B. Landoe, Francis I. Sabo, and Edwin B. Pegram,
Appellees,

BRIEF OF APPELLEES,

Hjalmer B. Landoe, Francis I. Sabo,
and Edwin B. Pegram

FILED

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MAR 29 1968

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No. 22343

In The

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Angus J. DePinto,
Appellant,

v.

Hjalmar B. Landoe, Francis I. Sabo, and Edwin B. Pegram,
Appellees.

BRIEF OF APPELLEES,

Hjalmer B. Landoe, Francis I. Sabo, and Edwin B. Pegram

I. Statement of the Case

For a complete statement of the case, the motion for Summary Judgment made by Defendant, Landoe on DePinto's cross-claim should be set forth. The motion was as follows: (Transcript 128)

"A. The matter of the cross-claim is res judicata for the reason that the trial court has previously dismissed the cross-claim, an appeal to the Circuit Court of Appeals did not reverse the trial court on this ground and for that reason the matter is res judicata.

B. By the substantive law of the State of Arizona, the matter is res judicata for reason that the cross-claimant Angus J. DePinto has been found liable for the negligence and a breach of fiduciary duty to the plaintiff by a jury, the Circuit Court of Appeals has affirmed the judgment, and under Arizona law there is no right of contribution or indemnification between joint tortfeasors, and therefore there is no genuine issue as to any material fact.

C. The cross-claim of defendant DePinto against defendant Landoe fails to state a claim upon which relief can be granted for the reason that under Arizona law there is no right of contribution or indemnification among joint tortfeasors."

The motion of Sabo and Pegram was identical and the memorandum on behalf of Landoe's motion was adopted by Sabo and Pegram. (Tr. 136)

The Court then made a memorandum order of summary judgment dismissing the cross-claim (Tr. 139-140) and likewise dismissed on Sabo and Pegram's motion. (Tr. 142) Judgment was entered accordingly.

II. Argument

Preliminary matters.

In the long and arduous trail of this case,

counsel for appellee recall the comment by one of the learned judges of the Circuit Court when he was appearing before that court on or about the third or fourth occasion, when the Judge said that he enjoyed seeing counsel but hoped that they might not return again on this same case. But such is not the luck of the court or counsel, and once again, we are here before this court on a different matter.

In Cause 18,245 in the U. S. Court of Appeals, Volume IV of the Transcript of Record, Page 1710, it is shown that motions were made by Landoe, Sabo and Pegram to dismiss the cross-claims of DePinto against these particular moving parties. The Trial Court stated on Page 1711 of this transcript, in granting the motion the following: (Tr. 130)

> "The cross claims of DePinto and Duhame are predicated on the contention that their liability, if any, is vicarious and secondary to that of the defendants against whom the crossclaims are asserted. The named defendants cite an Arizona case discussing primary and secondary tort liability and authorizing recovery of contribution or reimbursement to those held in the second category from those in the first category. Busy Bee Buffet v. Ferrell, 82 Ariz. 192; 310 P. 2d 817. Under the particular facts of this case neither DePinto nor Duhame qualifies as having only secondary liability as defined and applied in the cited decision. Both DePinto and Duhame are found and held to be primary joint tortfeasors and may not recover contribution under Arizona law. For these reasons the motion of defendants Sabo, Pegram and Landoe to dismiss the cross-claims of defendants DePinto and Duhame is hereby granted."

Subsequent to that time, trial was had against the appellant DePinto and the issues were limited to the matters that took place on or about October 18, 1957 in Phoenix, Arizona. (DePinto vs. Provident Security Life Insurance Company, 374 F.2d 37, 40.) We deem it important to point out to this Court, and as this Court has previously noted, that at the 4:00 p.m. meeting of the Board of Directors of United on October 18th, 1957, that appellant, DePinto, was present at the meeting, the minutes were expressly approved by him and signed by him. (Tr.52) At a meeting held subsequent to that time, at 4:15 p.m. on October 18th, DePinto was also present and the appellees, Frank I. Sabo and Edward B. Pegram, were not present, they being residents of Montana, and were actually in the State of Montana at that time. (Tr. 55). Although Sabo and Pegram were appointed to the Board of Directors of United Security, Landoe never was on the Board of Directors of United, and he likewise was absent from Arizona at all times when the complained of transactions took place. (Tr. 52-58)

Furthermore it is important to note that at no subsequent time did Landoe ever become a director of United and in the initial ruling by this Court, the Court held that liability, if any, of Landoe must be predicated upon that of negligence and not a breach of a fiduciary duty for the fact that he was never a member of the Board of Directors of United. This Court in DePinto vs. Provident Security Life Insurance Company, 323 F.2d 826, 836, said:

> "One ground for the judgment, applicable to all of the appellants, is gross negligence. Another ground, applicable to all appellants except Landoe, is breach of fiduciary duty.

Since the grounds for the motion for summary judgment were threefold, we shall argue these grounds in two parts--one on the question of the matter being res judicata, and secondly on the ground that the cross-claim failed to state a claim upon which relief can be granted for the reason that under the Arizona law there is no right of contribution or indemnification among joint tortfeasors. (Tr. 128).

A. Matter is Res Judicata

It may be conceded that since the Circuit Court did in its initial opinion, 323 F2d 826, at 838 state that there were certain other questions presented on the appeal that were not decided, and one was the cross-claim of DePinto against Landoe, Sabo and Pegram, that the absence of a ruling on this cross-claim would not make this issue of the claim res judicata. However, we respectfully submit that under substantive law of Arizona that it is res judicata.

It is universally recognized that in the absence of a statute, joint tortfeasors have no right of contribution between one another. This was established in Arizona in Blakely Oil vs. Crowder, 292 P2d 842. The facts are briefly that one Richmond brought an action against Blakely for damages for personal injuries suffered by him, and Blakely permitted a judgment to be entered against Blakely Oil. Thereafter, Blakely brought a claim against Crowder alleging that Crowder Cattle Company was negligent in permitting its cattle to strag upon a public highway, and alleged that this was the active, primary and efficient proximate cause of the injuries to Richmond. The cattle company filed a motion to dismiss the third party complaint, and contended that under provis-

ions of Section 21-446, 1952 Cum. Supp. A.C.A., 1939, the action was not maintainable. The Court, on page 843, considering Section 21-446 stated:

> "It will be seen from the above quotation, as amended, the right of a defendant to bring in a third-party defendant is limited to persons only who are secondarily liable to the original defendant and who are not primarily liable to the plaintiff in the original cause of action. If the third-party defendant is primarily liable to the original plaintiff he then becomes at most a joint tortfeasor with the third-party plaintiff and under such circumstances, according to all the authorities in the absence of statute, the original defendant, third-party plaintiff, may not maintain an action against him for contribution." (emphasis supplied)

The court then went on to consider the question of primary and secondary liability from Builders Supply Company vs. McCabe, 366 Pa. 322, 77 A.2d 368, 371, 24 ALR 2d 319. Primary and secondary liability will be considered more completely in the next portion of the Brief, but the court held that inasmuch as the defendant had permitted a judgment on the negligence aspect to go against him, that it was res judicata as far as his primary negligence was concerned, and there was no right of contribution. The court on this issue said on page 844:

> "In the case of concurrent or joint tortfeasors, having no legal relation to one another, each of them owing the same duty to the injured party, and involved in an accident in which the injury occurs, there is complete unanimity among the authorities

everywhere that no right of indemnity exists on behalf of either against the other; in such a case, there is only a common liability and not a primary and secondary one, even though one may have been very much more negligent than the other. The universal rule is that when two or more contribute by their wrongdoing to the injury of another, the injured party may recover from all of them in a joint action or he may pursue any one of them and recover from him, in which case the latter is not entitled to indemnity from those who with him caused the injury.

The court further said:

"Applying this rule to the instant case and assuming for the purposes of this opinion, but not deciding the question, that the cattle company was negligent, it is clear to our minds that Blakely is not in a position to maintain a cause of action against the cattle company. It suffered a judgment to be rendered against it in the original cause of action in a large sum. The fact that a settlement of the cause of action was reached by stipulation of counsel for the respective parties prior to its submission to the jury makes the judgment none the less res judicata as the fact of negligence on the part of Blakely in proximately causing the collision and the consequent injury to plaintiff. A reading of the McCabe case will show that all of the authorities are in accord with this statement. The contention of counsel for Blakely therefore that because the case was not submitted to the jury, there was no finding of negligence on the part of Blakely

is without merit. The cause of action as alleged in Blakely's third-party complaint against the cattle company shows upon its face that under the provisions of section 21-446, supra, it cannot be maintained. The third-party complaint should have been dismissed on the motion of the cattle company . . ."

The jury in the instant case found against DePinto , and this court in 374 F2d 37, 44 held that the evidence was sufficient in finding DePinto guilty of negligence, and said:

"The jury could have found that DePinto's failure to make a reasonable investigation as to whether the ultimate plan would adversely affect United, his resignation from the board of directors in compliance with Kelly's request and without having made such an investigation, and his failure, as a member of the board of United, to fight for the best interests of United, considered together, constituted negligence and a breach of fiduciary duty and was a proximate cause of the loss sustained by United as a result of the October 18, 1957 transaction.

We therefore conclude that the evidence was sufficient to warrant a jury finding against DePinto on the negligence, breach of fiduciary duty, and proximate cause issues raised by what DePinto states to be the controlling charges against him--those set forth in Counts VI and VII of the Doig complaint. It follows that the trial court did not err in denying the motions for a directed verdict, and for judgment notwithstanding the

verdict, made on the ground that the evidence was inadequate in this regard."

Therefore, the conclusion is compelling that since DePinto was guilty of negligence and a breach of a fiduciary duty, this issue is res judicata under Blakely Oil Company vs. Crowder, supra, and the trial court granting the motion for summary judgment on the basis of res judicata was correct, and the judgment should be affirmed as to all three of these appellees, Landoe, Sabo and Pegram.

B. The cross-claim failed to state a claim upon which relief can be granted against Landoe, Sabo and Pegram.

As stated above, the basic Arizona decision of Blakely Oil Company vs. Crowder 295 P2d 842, 843 establishes that in the absence of statute there is no right of indemnification between joint tortfeasors. Appellant, however, attempts to differentiate Busy Bee Buffet vs. Ferrell, 310 P2d 817, a case wherein the Supreme Court of Arizona held that there was such a thing as primary and secondary tort-liability under limited circumstances and that the secondary tortfeasor had a legitimate claim against the primary tortfeasor for indemnification. We submit, however, that the facts of the situation against Busy Bee Buffet vs. Ferrell certainly are different that the actual situation of the case of bar, different that Blakely Oil vs. Crowder, and is distinguished by a later Supreme Court case of Arizona not cited by appellant, but decided in 1967, being Thorton vs. Marisco, 425 P2d 869.

To understand Busy Bee in its proper perspective, you have to state the factual situation. The Buffet Company leased to one Pastis a res-

taurant building. The building had a trap door covering an opening leading into the basement. Pastis, the tenant in possession, left the trap door open, and the plaintiff, Ferrell, fell in the trap door. The Plaintiff, Ferrell, sued the Buffet and the Buffet cross-claimed against Pastis, the tenant, on the theory of the right of indemnification. Pastis was in control of the premises, Buffet was not. Pastis had left the trap door open, and the Buffet Company had no knowledge that the trap door was open. The court held that the light of these facts Pastis became primarily liable to Ferrell for the injuries he sustained, and Buffet was only secondarily liable. The court considered Blakely Oil Company vs. Crowder Cattle Company., Builders Supply Company vs. McCabe and Fidelity & Casualty Co., and cited from Fidelity & Casualty Co. of New York the same citation set forth on Page 16 of appellant's brief, but we call the court's attention to the last sentence of this citation from Fidelity as follows:

> "It does not mean that the joint tortfeasor whose negligence is the lesser can have indemnity from the other for damages caused by the concurring negligent act of both."

Considering whether in the case at bar DePinto is the lesser or greater tortfeasor under the last quoted differentiation is not important. The question is that he was a tortfeasor, and breached a duty, and that this was a proximate cause of damages suffered by United. This being the situation, he has no right of indemnification.

This is most clearly shown in the case of Thornton vs. Marsico, 425 P2d 869. This case is one in which the plaintiff, Marsico, brought an action against Thornton, a highway patrolman

and the State of Arizona, for injuries received while the highway patrolman was driving within the scope of his employment. Thornton, the patrolman, and the state cross-claimed against the contracting company that had built a detour and against Fidelity Deposit Company of Maryland as the company who had issued the bond for the Fisher Contracting Company. The cross-claim contended that Fisher had negligently constructed a detour, and that Thornton was only passively negligent in driving, and that therefore under Busy Bee they were entitled to indemnification from Fisher Contracting Company. The Fisher Contracting Company as third party defendant moved the court to dismiss the third party complaint for failure to state a claim. This motion was granted and an appeal taken. The court, in considering this, held that if both persons were negligent they were joint tortfeasors and stated on page 872 as follows:

> "The general rule which is followed in Arizona is that contribution is not allowed among joint tortfeasors. Blakely Oil, Inc. v. Crowder, 80 Ariz. 72, 292 P.2d 842 (1956); United States v. State of Arizona. 9 Cir., 214 F.2d 389 (1954) reh. den. 216 F.2d 248 (1954).
>
> (8) It is argued that Busy Bee Buffet v. Ferrell, supra, changed the general rule where one party is actively negligent and the other party is only passively negligent. We do not believe this to be so. What the Supreme Court of Arizona said was that when one was liable because of a duty imposed by law although he had not actively participated in the wrong which was the immediate cause of the injury, then that one had a right

to indemnity from the party who actively cause the injury. 7 Ariz. L Rev. 59, 69. This is an expansion of the law of indemnity and not an abrogation of the law of non-contribution among joint tort feasors. As the Supreme Court said in Busy Bee:

> "The term 'difference in kind and character' between the negligence of the Buffet and Pastis must not be confused with 'comparative negligence' or 'degrees of negligence.' "

When Thornton drove the patrol car he acted. This act excludes him from the category of "without personal fault" and therefore the third party plaintiffs do not come within the purview of Busy Bee Buffet v. Ferrell.

The granting of the motion to dismiss was proper as to count one."

This court in U. S. vs. State of Arizona et al, 214 F.2d 389 recognized and affirmed the Arizona law that there was no right of contribution by the joint tortfeasors. The U. S. brought a third party complaint against the State of Arizona after a judgment had been recovered against the U. S. from an unexploded bazooka shell injuring a young boy. A motion to dismiss the third party complaint was granted by the trial court and appealed to the Circuit Court of Appeals, Ninth Circuit, which affirmed the dismissal and stated on page 392:

> "We hold herein that the judgment of dismissal of the third party claim should be affirmed, and we do it upon the ground that the third party complaint failed to state a claim for the reason that in Arizona the law

> of the state, in the absence of a contract, in a case such as this, does not permit one tort-feasor to recover contribution from another tort- feasor liable for the same injury."

The Court went on further to state on page 393:

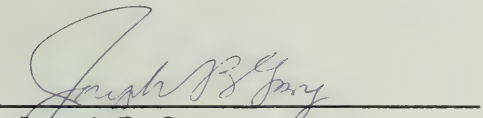
> "We hold that if a dismissal was proper on any ground, jurisdictional or failure to state a claim, the judgment should be affirmed here, irrespective of the nonassignment of grounds by the court or its assignment of the wrong ground. See Town of South Tucson v. Tucson Gas, Electric Light & Power Co., 9 Cir., 149 F.2d 847; Le Tulle v. Scofield, 308 U.S. 415, 60 S.Ct. 318, 84 L.Ed. 355. However, as shown above, Arizona did move to dismiss generally on the ground of failure to state a claim."

It follows then conclusively that since it has been adjudicated that DePinto breached his fiduciary duty and was guilty of gross negligence in relation to United in his capacity of director, that he was a primary, proximate cause tortfeasor. Being such, he has no right of indemnification and the Busy Bee case cannot be distorted to grant him a claim against these appellees, and the same ruling that was made in Thornton vs. Marsico, supra, should have been, and was made by the trial judge in this case, and should be affirmed.

This conclusion is most compelling as concerns Landoe for he was never a member of the board of United and never ratified and confirmed these acts while a member of American's board. This is coupled with the fact that he, as well as Sabo and Pegram, were not present in Phoenix

on the fateful day. They did not participate in any of the acts where the assets were transferred from United to Kelly. From this we contend that liability should not be imposed at all upon Landoe and if it were imposed on Sabo and Pegram they would at most qualify as secondary tort-feasors and would be entitled to endemnification from DePinto. However, Sabo and Pegram did not seek this relief and therefore, we submit, that once and for all this case should be laid at rest, the appeal denied, and the matter terminated.

Respectfully submitted,



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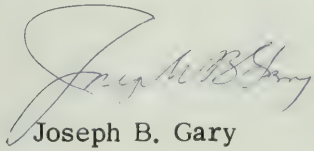
Attorney for Appellees,
Hjalmar B. Landoe, Francis I. Sabo, and Edwin B. Pegram

I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.



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Three true copies of the foregoing Brief of Appellees, Hjalmar B. Landoe, Francis I. Sabo, and Edwin B. Pegram served, via First Class Airmail, postage prepaid, this 20 day of March, 1968, upon: their named attorneys

No. 22243

United States Court of Appeals
For the Ninth Circuit

PACIFIC INLAND NAVIGATION CO., INC., *Appellant,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT

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United States Court of Appeals
For the Ninth Circuit

Pacific Inland Navigation Co., Inc.,	*Appellant,*	No. 22243
vs.		
Fireman's Fund Insurance Company,	*Appellee.*	

Appeal from the United States District Court for the Western District of Washington Southern Division

BRIEF OF APPELLANT

JURISDICTION

This civil action at law was commenced by complaint filed in the United States District Court at Tacoma by the appellant, Pacific Inland Navigation Co., Inc. against the appellee, Fireman's Fund Insurance Company. The complaint alleged that the appellant was a Washington corporation and the appellee was a California corporation and the amount in controversy was in excess of $10,000, exclusive of interest and costs (Tr. 1).

The appellee's answer admitted these jurisdictional allegations (Tr. 13).

The jurisdiction of the United States District Court for the Western District of Washington, Southern Division is based upon USC Title 28, Section 1332.

Summary Judgment in favor of appellee was signed and filed on July 31, 1967 (Tr. 45). Thereafter, appellant duly filed its Notice of Appeal on August 29, 1967 (Tr. 53). Accompanying Notice of Appeal was Appeal and Supersedeas Bond in proper amount and form in accordance with Rule 75, Rules of Civil Procedure (Tr. 49).

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Title 28, USC, Section 1291.

STATEMENT OF THE CASE

Appellant brought this civil action to compel appellee to honor its contractual obligation to indemnify appellant against loss by reason of liability imposed upon it by law for damages. The contract in question is Fireman's Fund Insurance Company Policy No. LS-1214 effective June 1, 1964. The particular accident was suffered by a longshoreman Friedolf Humpla while directly employed by appellant aboard one of its barges in the Port of Portland, Oregon on September 27, 1964.

Humpla subsequently brought suit against appellant in reliance upon the case of *Reed v. S/S YAKA,* 373 US 410, 10 L.ed 2d 448, 83 S.Ct. 1349 (1963) (Tr. 5). That suit was subsequently tendered for defense to appellee which said tender was rejected (Tr. 1, 13). Thereafter, appellant settled the Humpla suit

for $35,343.85. Of this amount $30,000.00 was paid by appellant and the remaining balance was contributed by appellee through waiver of its statutory lien under the Longshoremen and Harbor Workers' Compensation Act for medical expenses and compensation paid (Tr. 14).

The basis of this suit is the policy of insurance identified above. For convenience, copy of this policy is attached to this brief as an appendix. The coverage upon which appellant relies is set forth in paragraph One (b) stating in part:

> "To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada . . ."

The appellee has denied coverage for this loss suffered by appellant maintaining that endorsement No. 2 restricted policy coverage only to the Longshoremen and Harbor Workers' Compensation Act. Both appellant and appellee, feeling that this was solely a question of construction, filed motions for summary judgment (Tr. 19, 29). Both motions were heard by the court below which thereafter entered its summary judgment on July 31, 1967, stating in part:

> "* * * and the Court having found that there is no dispute of material facts concerning the insurance contract and endorsements thereto issued by Fireman's Fund Insurance Company as Policy No. LS-1214, and concluding that the language of said contract, as endorsed, did not cover the liability of the plaintiff assured in a lawsuit brought under the authority of *Reed vs.*

The Yaka, 373 U.S. 410 * * * " (Tr. 45)

The judgment concludes by dismissing appellant's complaint and awarding the appellee judgment on its counter claim in the amount of $5,343.85 expended by it under waiver of its statutory lien (Tr. 46).

SPECIFICATIONS OF ERRORS

1. The District Court erred in "concluding that the language of said contract [of insurance], as endorsed, did not cover the liability of the plaintiff assured in a lawsuit brought under the authority of *Reed vs. The Yaka,* 373 US 410." (Tr. 45).

2. The District Court erred in dismissing appellant's complaint (Tr. 45).

3. The District Court erred in awarding appellee's judgment on its cross-complaint in the amount of $5,343.85 (Tr. 45).

4. The District Court erred in not concluding that appellee was obligated under coverage One (b) to indemnify appellant for its loss as pleaded.

SUMMARY OF ARGUMENT

Appellant's argument will develop:

I. Appellant's liability to injured longshoreman — the employer-employee relationship, the application of *Reed v. SS YAKA;*

II. Law of forum to apply — diversity rule requires application of State law even though a Marine Insurance policy is involved;

III. The contract of insurance — applicable Washington rules of construction, consideration of the actual contract of insurance under those rules.

ARGUMENT

I—APPELLANT'S LIABILITY TO INJURED LONGSHOREMAN

In *Seas Shipping Co. v. Sieraciki,* 328 U.S. 85, 90 L.ed 1099, 66 S.Ct. 872 (1946), the doctrine of seaworthiness was extended to longshoremen even though an injured longshoreman was employed by an independent contractor. The effect of this decision was to afford the injured longshoreman recovery against a shipowner under its warranty of seaworthiness.

Since §905 of the Longshoremen and Harbor Workers' Compensation Act states that the liability of "an employer prescribed in §904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ." the question was destined to arise whether an injured longshoreman could recover under the warranty of seaworthiness when his employer was also the owner or bareboat charterer of the vessel. In dealing with the question, the Supreme Court in *Reed v. S/S YAKA,* 373 US 410, 10 L.ed 2d 448, 83 S.Ct. 1349 (1963) stated:

> "We conclude that petitioner was not barred by the Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the Yaka's unseaworthiness in order to support his libel in rem against the vessel." *Reed v. S/S YAKA,* 10 L.ed 2d, 448, 453.

Humpla's action was thus based on his right against

his shipowner-employer under the warranty of seaworthiness as made available by the *YAKA* decision. Appellant as an employer in settling with Humpla, its employee, brought itself within coverage of provision One (b) of the contract of insurance in issue.

II—LAW OF FORUM TO APPLY

Neither appellant nor appellee has pleaded or argued any law other than the common law of the forum. That state law rather than Federal Maritime Law controls the rights and liabilities under Marine Insurance policies was settled in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 99 L.ed 337, 75 S.Ct. 368, 55 AMC 467 (1955). The court stated:

> "The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."
>
> *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 99 L.ed 337, 344 (1955).

The principle that State law will control the construction of marine insurance contracts has been expressly recognized in this circuit in *Employers Mutual Liability Insurance Co. of Wisconsin v. Pacific Inland Navigation Co.,* 358 F.2d 718, 1967 AMC 1855 (9CA, 1966). This case involved the question whether the insurance policy as endorsed covered liability of the insured to the Port of Pasco for damage caused to the Port's dock by fire originating on a barge owned by the insured. Jurisdiction was based on di-

versity. Regarding the applicable law, the Court stated:

> "Federal diversity jurisdiction is invoked. The law of Washington governs. [See. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.ed. 337 (1955); Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188 (1938.]"
>
> *Employers Mutual Liability Insurance Co. of Wisconsin v. Pacific Inland Navigation Co.,* 358 F.2d 718, 719, 1967 AMC 1855 (9CA, 1966).

These cases clearly demonstrate the applicability of state law to a marine insurance contract such as is involved in this case. In the absence of pleading and/or proof of foreign law, the law of the forum, that is the common law of the State of Washington, should govern. This conflicts of law principle, "the local law theory" is advocated both by Ehrenzweig in his treatise, *Conflicts of Laws,* and Currie in his work, *Selected Essays on the Conflict of Laws.*

Currie's conclusions on the local law theory regarding the applicability of the law of the forum are summed up as follows:

> "1. The normal business of courts being the adjudication of domestic cases and the normal tendency of lawyers and judges being to think in terms of domestic law, the normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course.
>
> "2. The court should ordinarily depart from this procedure only at the instance of a party wishing to obtain the advantage of a foreign law.
>
> "3. The law of the forum, as a source of the rule of decision, should normally be displaced only by the interested party's timely invocation

> of the foreign law. The interested party invokes the foreign law by calling attention to its relevance and its superior claim to be applied, and by informing the court of its tenor. . . ."
>
> *Selected Essays on the Conflict of Law*, by Currie, Page 75

A recent Ninth Circuit decision, *Continental Casualty Co. v. Thompson,* 369 F.2d 157 (9 CA 1966) evidences an acceptance of the local law theory of conflicts of law advocated by Ehrenzweig and Currie. In this regard, the court stated:

> "In this diversity case, we are of course bound to apply the law as would the Supreme Court of Washington. In the court below appellant asserted that the proper choice of law should be that of Washington, D. C., where the master policy under which Thompson was insured had been delivered. The District Judge ruled that since it had not been shown that the law of Washington, D. C. differed from that of the State of Washington, the courts of the State would apply their own law. This is not disputed on appeal."
>
> *Continental Cas. Co. v. Thompson,* 369 F.2d 157, 158 n.1 (9CA 1966).

Thus in the absence of any applicable foreign law being pleaded in the lower court, the law of the forum, that is the law of Washington, is applicable in construing this insurance contract. This contention is supported by the fact that since this appeal is made from a summary judgment, there is nothing in the record sufficient to form a basis for the application of foreign law.

III—THE CONTRACT OF INSURANCE

A. Applicable Washington Rules of Construction:

The following are rules of contruction applicable to construing insurance policies in Washington:

1. *Exclusionary clauses in insurance contracts are strictly construed against the insurer.* This construction principle was most recently applied in *S. L. Rowland Construction Co. v. St. Paul Fire and Marine Ins. Co.,* 72 W.Dec. 2d 675, 434 P.2d 725 (1967). This case involved action on a fire insurance policy issued to a building contractor following a fire in a newly constructed residence. The fire was caused by the contractor's placing a joist too near the firebox of an upstairs fireplace. The policy contained an exclusion which stated that the policy did not apply to

> ". . . injury or destruction of:
>
> (4) any goods, products, or containers thereof manufactured, sold, handled or distributed by the Insured, or work completed by or for the Insured, *out of which the accident arises,* nor to costs of repair or replacement thereof." (Italics ours).
>
> *S. L. Rowland Construction Co. v. St. Paul Fire and Marine Insurance Co.,* 72 Wn. Dec. 2d, 675, 679.

It was not clear whether the exclusion pertained to all portions of the damaged structure or only to the particular part of the structure that was defective. In holding the latter, the court interpreted the ambiguity against the insurer with the following statement:

> "[1] Our determination of this question is governed by the established rule, as stated in *Labber-*

ton v. General Cas. Co., 53 Wn.2d 180, 182, 332 P.2d 250 (1958):

> '[T]he law in Washington is settled by a long line of cases recently reaffirmed by *Selective Logging Co. v. General Cas. Co.,* 49 Wn.(2d) 347, 301 P.(2d) 535, that exclusionary clauses are strictly construed against the insurer.' "
>
> *S. L. Rowland Construction Co. v. St. Paul Fire and Marine Insurance Co.,* 72 Wn. Dec. 2d 675, 681.

2. *The meaning most favorable to the insured must be applied where a part of the policy is susceptible to two different meanings.* This principle was recently recognized in *Safeco Ins. Co. of America v. McManemy,* 72 Wn.Dec. 2d 212, 432 P.2d 537 (1967). In this case the court was dealing with the uninsured motorist clause of an automobile policy. The Washington Supreme Court, contrary to the trial court, found an ambiguity in the contract and applied this principle of law to find in favor of the insured.

3. *The meaning and construction most favorable to the insured must be applied even though the insurer may have intended another meaning. Safeco Ins. Co. of America v. McManemy,* supra. *Town of Tieton v. General Ins. Co. of America,* 61 Wn.2d 716, 380 P.2d 127 (1963).

4. *In construing the contract, each part, if possible, should be construed so that all parts thereof shall have some effect. Safeco Ins. Co. of America v. McManemy,* supra; *Hollingsworth v. Robe Lbr. Co.,* 182 Wn. 74, 45 P.2d 614 (1935).

5. *Riders or endorsements do not modify or supersede provisions in the basic policy unless expressly*

so stated in the rider. The Washington court in *Holthe v. Iskowitz,* 31 Wn.2d 533, 197 P.2d 999 (1948) cited 44 C.J.S., Insurance, §300, page 1206 with approval:

> "*Rider or attached slip.* As a general rule, a lawful slip or rider which is properly attached to a policy and referred to therein is a part of the contract and should be constructed in connection with the other provisions of the policy, and the entire contract should be harmonized therewith if possible. Notwithstanding the attaching of a rider, provisions in the body of the policy are still parts of the contract and are not superseded, waived, limited, or modified by the provisions of the rider, except to the extent that it is expressly stated in the rider that the provisions thereof are substituted for those appearing in the body of the policy, or that the provisions of the rider have the effect of creating a new and different contract from that of the original policy; and except where the provisions in the policy proper and those in the rider are in conflict, in which case the latter control in construing the contract, especially where the provisions of the rider are the more specific.' "
>
> *Holthe v. Iskowitz,* 31 Wn.2d 533 541-542, 197 P.2d 999, 1004 (1948).

6. *The typewritten provision of a policy of insurance controls where inconsistent with printed portions. Holthe v. Iskowitz,* 31 Wn.2d 533, 197 P.2d 999, 1004 (1948). *Employers Mutual Liability Insurance Company of Wisconsin,* 358 F.2d 718, 719 (1966) and cases cited therein.

The following construction principles have not been specifically enumerated by the Washington Supreme Court but may fairly be inferred to be accepted by the Washington Court, basically because of their con-

sistency with the principles already enumerated:

1. *A later numbered endorsement controls one with an earlier number.* This principle is pointed out in 44 C.J.S. Insurance, §300, page 1208.

2. *"Having affirmatively expressed the coverage in a broad promise to defend and to indemnify, it was incumbent on the company to define the exclusions from that promise in clear terms." Insurance Co. of N.A. v. General Aviation Supply Co.,* 283 F.2d 590, 592 (CA 8, 1960). In this case, the Eighth Circuit Court of Appeals found coverage under an omnibus clause in an aircraft liability policy.

B. ANALYSIS OF THE POLICY

Fireman's Fund Policy No. LS-1214 provides for two basic coverages:

> "One (a) TO PAY PROMPTLY to any person entitled thereto, under the Workmen's Compensation law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due . . .
>
> One (b) TO INDEMNIFY this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America . . ."

Both coverages by their terms are such as to require endorsements in order to make them complete. For that reason and for others, a total of ten endorsements are attached to the policy. With regard to coverage

one (a) printed endorsements 1 and 2 were attached so as to particularly describe the precise workmen's compensation law intended; that is, the Longshoremen and Harbor Workers' Compensation Act. In that manner, the requirements of one (a)(1) were satisfied.

Appellee to avoid coverage for appellant's loss occasioned by the Humpla injury must now find an interpretation of the policy so as to completely vitiate coverage afforded under section one (b). Appellee in the court below has argued that by endorsement 2 all coverage afforded by this policy has been eliminated save liability under the Longshoremen and Harbor Workers' Compensation Act. Appellee points to the second paragraph of endorsement 2 reading:

> "It is mutually understood and agreed that except as this policy may be otherwise extended by endorsement, no other liability of any nature whatsoever, except as defined by the said Longshoremen's and Harbor Workers' Compensation Act, is covered hereunder,"

as the basis for this contention. How patent is the fallacy of this argument is borne out by the fact that elsewhere in the contract of insurance by subsequent endorsement 6 entitled "Schedule of Operations" Fireman's Fund charges a premium rate for work performed of a nature not possible of being covered under the Longshoremen and Harbor Workers' Compensation Act. We specifically address attention to Code 6872 of the schedule of operations covering Oregon and Washington. Under that classification, work of a nature without the coverage provision of the Longshoremen and Harbor Workers' Compensation Act is provided for.

Section 903 of the Longshoremen and Harbor Workers' Compensation Act provides

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *".

As interpreted, many of the operations included in the schedule of operations enumerated in endorsement 6 are completely without the coverage of the Act in question. The only effect, therefore, in including those provisions in endorsement 6 is to bring those operations of appellant company within the coverage of section one (b). As an endorsement subsequent in number to endorsement 2, endorsement 6 has added force and effect.

That coverage afforded under section one (b) is fully effective notwithstanding endorsement 2 is borne out by typewritten endorsement 4 entitled "Limitation of Liability Endorsement Paragraph One (b)." Being a typewritten endorsement under rules of insurance contract construction it is entitled to greater effect than the printed endorsements prior to it in number. Endorsement 4 places a limit of $100,000 on Fireman's Fund liability with regard to its obligations under section one (b). Nowhere in this endorsement does Fireman's Fund in any respect limit, qualify or restrict the coverage, force and effect of one (b).

Not only do we feel that the preceding comments

have established the obligation of appellee but there are other areas of this contract of insurance written by Fireman's Fund which have created areas of doubt and confusion to which the particular rules of construction of insurance contracts are applicable.

Endorsement 2 begins in its first sentence with a specific limitation of coverage directly keyed to paragraph one (a). Appellee would then argue that the limitation proceeds from the specific to the general so as to, in its later paragraph, eliminate any other liability whatsoever under the policy. Our courts have held, however, that notwithstanding the attaching of an endorsement, provisions in the body of the policy are still part of the contract and are not superseded, waived limited or modified by the provisions of an endorsement except to the extent that it is expressly stated in the endorsement that the provisions thereof are substituted for those appearing in the body of the policy.

We submit that the construction of endorsement 2 as contended by appellee falls far short of this requirement of exactness.

Appellee argued in the court below that paragraph one (b) of the coverage was effective only in the event of the circumstance detailed in paragraph 3 of endorsement 2; that is, if the Longshoremen and Harbor Workers' Compensation Act were declared unconstitutional. It is the position of appellee that only in that event is there any coverage afforded under one (b). The particular limiting paragraph of endorsement 2, however, nowhere states that this is the only circumstances under which one (b) is to have force and effect. Again, appellee fails to show by

clear and cogent language that coverage under one (b) is so restricted.

The fourth paragraph of endorsement 2 makes the endorsement "subject to all the terms, conditions and agreements of policy LS-1214." Of course, one of the terms and conditions of this policy is coverage under one (b).

If endorsement 2 is read as appellee argues, this policy in question is nothing more than coverage under the Longshoremen and Harbor Workers' Compensation Act. Not only would section one (b) be eliminated but also all of the obligations of the contract whereby in paragraphs 2, 3 and 4 appellee undertook to serve the employer in certain regards as to inspection of work places, investigation of injuries, settlement of claims, to defend the employer and to pay costs taxed against the employer.

We submit that Fireman's Fund cannot by the language employed in endorsement 2 completely alter the entire insurance contract eliminating coverage for which it was charging and collecting a premium and destroying contractual obligations which it had incurred.

CONCLUSION

Pacific Inland Navigation Company, Inc., for valuable consideration, purchased a policy of insurance. It has performed all of its obligations and now asks that Fireman's Fund Insurance Company, in turn, perform its contractual obligation.

The injured party was an employee covered under

section five of the policy. The particular injury involved was an injury covered under section six of the policy. The injury occurred during the policy period as provided by section seven of the policy. The loss suffered by the employer was within policy limits and of a nature as covered by section one (b) of the policy.

Clearly, appellant is entitled to a reversal of the judgment below and direction of entry of a judgment in its favor according to the prayer of its complaint.

Respectfully submitted,

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No. 22,244

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE L. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment for the defendant entered on February 27, 1967, by the United States District Court for the Eastern District of California (TR 62, 63) on the cause of action pleaded in the complaint (TR 1, 2), and from the trial court's denial of a motion for new trial (TR 77-81).

The pleaded act of negligence of defendant occurred on or about May 23, 1963, at the United States Naval School of Aviation Medicine, an agency of the United States of America, in Pensacola, Florida. The complaint was filed on March 22, 1965, and thus was

within two years of the contended act of negligence (TR 1). The suit is against the United States of America and is governed by the Federal Tort Claims Act, 28 U.S.C. 1346(b) and 2671 et seq. (TR 38, 39).

The trial court granted judgment for the defendant on the basis that under the evidence the defendant was not shown to be negligent (TR 63, 65). Plaintiff, on March 8, 1967, filed a motion for a new trial (TR 69) which was denied on April 24, 1967 (TR 77-81).

Plaintiff, on June 22, 1967, filed in this court a timely Notice of Appeal under 28 U.S.C. 1291 (TR 82).

STATEMENT OF THE CASE

This is an action brought by George L. Smith for damages due to injuries suffered by him through the negligent acts of employees and agents of the United States of America.

1. Negligence Under Florida Law

Under the provision of 28 U.S.C. 2674, the United States is liable for its torts in the same manner and to the same extent as a private individual under like circumstances. This has been interpreted as requiring the application of the law of the State where the tort was committed to the facts of the case. *Boe v. U. S.* (C.A.N.D. 1965), 352 F.2d 551; *Williams v. U. S.* (C.A.Ga. 1965), 352 F.2d 477, appeal after remand 379 F.2d 719.

On page 3, Section 2, of Volume 18 of *Florida Law and Practice,* negligence is defined generally as the failure to exercise such care as the circumstances demand. This statement is elucidated by the following excerpt from pages 3 and 4 of the above cited work:

> "The Supreme Court of Florida has defined negligence as the failure to observe, for the protection of another's interest, such care, precaution and vigilance as the circumstances justly demand, or the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances, or the doing of what such a person would not have done under the circumstances.
>
> "Actionable negligence arises where the injury to one person is proximately caused by the failure of another to exercise such reasonable care and diligence as should have been exercised under the circumstances in view of the relation of the parties to each other at the time.[2] Negligence is measured by conditions at the place and time of injury, and in an action for an injury occasioned by the alleged negligence of a person, the negligence, if any, of such person, or of the person injured, is to be measured by the condition of things at the place where the injury took place, as they were known to exist by each of the parties at the time the acts of each are complained of as being negligent.[3]
>
> "The amount of care which a person is required to exercise depends on a large measure on the extent to which his conduct may involve a risk of harm to others, and as the likelihood that others may be injured increases, the amount of care which should be exercised also increases, and acts

that might be considered prudent in one case might well be negligent in another.[4]" (Footnotes omitted.)

A further expression of Florida law with reference to the duty owed by a person to business invitee is found on pages 15 and 16 of the above cited volume:

"Those who expressly or impliedly invite others upon their premises for purposes of lawful business, must use ordinary and reasonable care to maintain the premises in a reasonably safe condition for their use and are liable for derelictions in such respect of which they knew, or by the exercise of reasonable and ordinary care should have known. *A person who, under the circumstances, comes on the premises for the purpose of transacting business with the owner is known in the law as an invitee.*[53] In order for the relationship of invitor and invitee to arise, the person entering onto the premises, the invitee, must have done so for purposes which would have benefited the owner or occupant of the premises, the invitor, and this benefit must be of a material or commercial nature, rather than of a spiritual, religious or social nature.[54]" (Footnotes omitted; emphasis added.)

2. The Facts of this Case

The Pensacola Study of Naval Aviators, popularly known as the "Thousand Aviator Study" began in 1940 when 1,056 student aviators and flight instructors were examined on a variety of physiological and psychological parameters. This longitudinal study has been continued with follow-up examinations in 1951, 1957 and 1963.

George L. Smith, appellant, at the time of the inception of this study, was in a flight school training program with the United States Navy and was requested to volunteer as a participant in the Thousand Aviator program. This experimental group consisted of a portion of the officers, cadets and enlisted men undergoing flight training in Pensacola, Florida, from July, 1940, to May, 1941. Mr. Smith participated in the testing program through the years in accordance with the requests which he received from the United States Naval School of Aviation Medicine (Plaintiff's Exhibits 2-1, 2-2, 4 and 5, RT 22, 23, 35).

In 1962, Dr. Fregly became a member of the Vestibular Psychology branch of the Naval Aviation School of Medicine at Pensacola, Florida (RT 53). He began as a collaborative researcher, and has been active in the Thousand Aviator Study since 1963 (RT 54). Within that study, he is responsible for the Postural Equilibrium Test Battery, commonly known as the "Graybiel-Fregly Ataxia Test" (RT 54). This battery is composed of four tests: (1) Standing on the floor in a heel-to-toe position with eyes closed for a prescribed period of time; (2) Walking heel-to-toe with feet tandemly aligned on a ¾-inch wide rail with arms folded across the chest and eyes open; (3) Standing heel-to-toe with feet tandemly aligned on a ¾-inch rail, arms across the chest, eyes open; and (4) Standing heel-to-toe with feet tandemly aligned on a 2¼-inch rail with eyes closed and arms folded across the chest (RT 54, 55).

The purpose of these tests is to enable a study of the effect of age on the organs of balance to be made (RT 62). With reference to the Graybiel-Fregly Ataxia Test, "ataxia" is defined as a loss of motor ability or motor control (RT 77). "Vestibular ataxia" is defined as locomotor skill or postural equilibrium, as further defined in standing with eyes open and/or closed insofar as defects in the inner ear can be attributable as the source for the loss of motor ability or postural equilibrium (RT 78). It is further defined, with reference to the study of the cardiovascular effects of aging, as the base line study of balance as a function, or as it changes, in aging.

Dr. Fregly adapted this test from an older equilibrium test, his contribution to it being the addition of the positioning of the testee's arms folded across his chest for the purposes of limiting those skills of balance which would tend to enable the testee to have a more capable balancing position by use of the body and its extensions (RT 55, 57, 79, 82). In other words, it is a test of body capacity for balance, especially of the inner ear, apart from the learned skills of the person or the body postures which he is accustomed to using for balance (RT 79).

With regard to the effects of aging upon the inherent ability to balance oneself, Dr. Fregly's tests, at the time appellant (Mr. Smith) was being tested, had shown significant differences in the results of the ataxia test in different age groups (RT 84). For example, in the standing tests, that group comprised of testees from the ages of 17 to 42 attained a score

of 103.8 as opposed to a score of 52 for those in the age group of 43 to 50 (RT 86). In the walking tests, the score for the age group of 17 to 42 was 12.5 steps, as opposed to a score of only 10.4 steps for the group comprised of testees of the ages of 43 to 50 (RT 86). At the time he took the tests, Mr. Smith was the age of 47 and this fact was known by defendant at that time (RT 87, 90; Plaintiff's Exhibit 8).

In devising these tests, Dr. Fregly intentionally provided for the exclusion of the most commonly used and most efficient means of balance that a person has, his arms, so that it would be a true test of the inherent balance ability of the testee and not merely a test of his ability to regain balance or to use his arms or other balancing mechanisms to achieve or maintain his balance (RT 79). With this in mind, a ¾-inch rail was used for the test, since it was found that a rail of that particular width gave a greater distribution of scores (RT 69). In other words, a rail of the size upon which appellant fell was known by defendant at the time of the accident to have a propensity, more than rails of other sizes, to cause testees to lose their balance in such a way that a grading of the scores could be maintained (RT 69).

In addition, Dr. Fregly required that the testee's primary balancing faculties, his arms, be immobilized and thus rendered useless in case of a loss of balance, by having the testee fold his arms across his chest (RT 12, 55). He also required tandem alignment of the feet so that the testee would have as little use as possible of the foot platform as a balancing agent (RT 55, 87, 89).

Having never taken, nor having in any way experienced, the Graybiel-Fregly posture test in any of the previous sessions of the Thousand Aviator Study in which he participated, Mr. Smith was unaware of any danger inherent in the procedure, and had no apprehension or fear of doing something dangerous (RT 24). Examinees were given no warning, either visual or oral, as to the nature of the tests with relation to the fact that the test was designed to test the balance of the person and that his chances of losing his balance were increased because his natural balancing faculties were eliminated by the postural requirements of the test (RT 25). In the plaintiff's opinion, there was nothing particularly hazardous about the rail or the test that he was aware of or was informed of (RT 24, 32). No protective devices were used to aid the person being tested in case he did lose his balance. No railings or guards were provided (RT 16, 17), no carpeting was put around to cushion any falls (RT 19), nor were there any persons standing near to help the testee regain his balance, should he start to fall (RT 13, 80, 81).

In taking the test, Mr. Smith did, while explicitly following the instructions of the technician administering the tests, lose his balance, and fall, striking the metal rail on which he was walking with his right hip. As a result of this fall, and the damage resulting from it, the trauma caused asceptic necrosis in the right femoral head, which continues and which will completely degenerate the head in the course of time, disabling plaintiff (TR 2).

In his complaint, the plaintiff sought to hold the United States liable for the negligence of its agents in administering this test (TR 1, 2).

The court found that plaintiff was injured when he fell from the metal rail along which he was walking while participating in the Graybiel-Fregly Ataxia Test as a part of the Thousand Aviator Study at the Naval School of Aviation Medicine in Pensacola, Florida; that neither Dr. Fregly nor any other agent, servant or employee of the United States was negligent or careless in allowing the plaintiff to take the test as he did; that plaintiff failed to establish the negligence of defendant, or any of its agents, servants or employees, and therefore, was entitled to recover nothing by his complaint (TR 65). On March 9, 1967, plaintiff moved the court to set aside the judgment entered on the 27th of February, 1967, and to grant a new trial on the grounds of newly discovered evidence (TR 69). The motion for new trial was denied on April 24, 1967 (TR 81), and this appeal followed (TR 82).

SPECIFICATION OF ERRORS RELIED ON

This appeal is based on three errors of the trial court:

I. The District Court erred in ignoring the uncontroverted evidence that the government's agents, who were in a position of superior knowledge and control and upon whom plaintiff had a right to rely, were negligent in the conduct of the test which injured

plaintiff and were further negligent in not informing plaintiff of the dangers inherent in the test, which dangers were known only to them and could not be discovered or avoided by plaintiff through reasonable care and actions, and were further negligent in not protecting plaintiff from the injury flowing as a natural consequence from the dangerous situation in which they placed plaintiff.

II. The District Court erred in finding that there was evidence to support an order that there was no negligence on the part of defendant.

III. The District Court erred in denying a motion for a new trial on the grounds that the evidence could have been discovered with the exercise of due diligence and that it would not have changed the opinion of the court if a new trial had been granted.

I and II

ERROR IN IGNORING UNCONTROVERTED EVIDENCE OF NEGLIGENCE

In defendant's pretrial memorandum, it was stipulated that the substantive law of the State of Florida, where the accident occurred, is controlling in this case. 28 U.S.C.A. 1346(b) (TR 39).

The Supreme Court of Florida has defined negligence as the failure to observe, for the protection of another's interest, such care, precaution and vigilence as the circumstances justly demand, where the failure to do what a reasonable and prudent person would

ordinarily have done under the circumstances, *Smith Electric Co. v. Hinkley* (1929), 98 Fla. 132, 123 So. 564; *DeWald v. Quarnstrom* (1952), 60 So.2d 919, 921. Under the law of Florida the amount of care which a person is required to exercise in each situation depends to a great extent on the likelihood that his conduct may involve a risk of harm to others, and for this reason, acts that might be considered reasonable in one case might well be negligent in another, *Jacksonville Journal Co. v. Gilreath* (1958), 104 So. 2d 865.

It has been admitted that plaintiff held the relationship of an invitee to defendant since plaintiff was on the property of defendant for the purposes of conducting business for and with defendant (RT 120). It is Florida law that the owner or occupant of a place of business owes to an invitee who is on the premises in pursuit of business the duty to exercise reasonable care to maintain the premises in a safe condition and to guard against subjecting the invitee to dangers which are known to the owner or which the owner might reasonably anticipate. *Howland Inc. v. Morris* (1940), 143 Fla. 189, 196 So. 472; *McNulty v. Hurley* (1957), 97 So.2d 185, 188.

In the case of *Hall v. Holland* (1950), 47 So.2d 889, a case decided in the Supreme Court of Florida, the court stated, at page 891, that the owner-occupier of a premises has the duty to an invitee

> "to use reasonable care in maintaining the premises in a reasonably safe condition and to have given plaintiff timely notice and warning of

> latent and concealed perils, known to the defendant, or which by the exercise of due care should have been known to him, and which were not known by the plaintiff. . . ."

On page 892 the court expanded this statement by saying,

> "The duties to keep the premises safe for invitees extends to all portions of the premises which are included within the invitation and which it is necessary or convenient for the invitee to use or visit in the course of the business for which the invitation was extended, and at which his presence should therefore reasonably be anticipated or to which he is allowed to go."

The facts of the case at bar blend in perfectly with the statements and reasoning of the court in *Hall v. Holland.* Here we have a case where the plaintiff had come on to the property of defendant for the purpose of conducting business with the defendant and to be subjected to tests for the benefit of defendant at defendant's request so that defendant could continue and complete the Thousand Aviator Study (RT 6, 7, 22, 23, 35).

The portion of the "Thousand Aviator Study" with which we are concerned in this case is the "Graybiel-Fregly Ataxia Test." On page 77 of the Reporter's Transcript on Appeal, Dr. Fregly defines the term "ataxia" as "a loss of motor ability." Further on page 77 he defines the testing of vestibular ataxia as "a test of the loss of locomotor skill in one instance or of postural equilibrium as further defined as standing

with eyes open and closed insofar as defects in the ear can be attributed as a source for the loss of this ability." Dr. Fregly testified further as reported on page 79 of the Reporter's Transcript that the test was devised to develop a stringent body position which would rule out any gimmicks or anything that would lessen the scores for maintaining the balance, such as swinging the arms or letting the subjects ad hoc body postures which would give all sorts of scores which would eventually be meaningless to interpret.

Dr. Fregly is a research psychologist at the Naval Aerospace Medical Institute. He is employed in the vestibular psychology branch, medical sciences division. He was instrumental in developing the Graybiel-Fregly Ataxia Test and is directly responsible for the postural equilibrium test battery in the Thousand Aviator Study (RT 53, 54).

As described by Dr. Fregly, the test "involved (1) Standing on the floor, head-to-toe; (2) walking a ¾-inch wide rail, 8 feet in length, with eyes open; (3) standing on the rail with eyes open; (4) standing on the 2¼-inch wide rail with eyes closed" (RT 54, 55). As depicted on page 58 of the Reporter's Transcript of the trial, the body position is designed so that all means of maintaining balance except for the use of the head are eliminated. On page 87 of the Reporter's Transcript, Dr. Fregly describes the position of the feet of the testee as being tandemly aligned "so the tandem alignment narrows the base of support as much as it can be narrowed." On page 88 he amplified this by a statement that the purpose

of the tandem alignment is to narrow the base of support to get more at the inner ear contribution to maintain balance and to make a greater demand on the balance sensation from the inner ear.

Additionally, on pages 62 and 87 of the Reporter's Transcript, Dr. Fregly states that the balance test is used to study the effect of age on the organs of balance. He testified that there is adequate and significant evidence that there is a marked change in the balance results of tested individuals between the ages of 42 and 43. In the group from 17 to 42 years old the score was 103.8 and the group comprised of 43 to 50 year olds scored 52. These scores were compiled in the test of standing with eyes closed on the rail. In the test of walking on the rail, the 17 to 42 year old group scored 12.5 steps while the 43 to 50 year old group scored only 10.4 steps. At the time of the test appellant was 47 years of age and Dr. Fregly admitted that at the time he tested appellant he knew that a person of his age would probably be less successful on the rail than a younger person would be (RT 84, 86).

Of paramount importance in this case is the relationship of the parties in terms of the superior knowledge of defendant's agent and the right of plaintiff to rely thereon. As co-originator and co-designer of the Graybiel-Fregly Ataxia Test, Dr. Fregly was also the person in charge of conducting the test at the time that appellant was injured (RT 54). As detailed above, he was in a position of superior and prior knowledge as to not only the nature

of what was being tested, i.e., the inherent balance of persons of differing ages and how this balance was affected by the effects of age and aging, but also was in such a position with reference to the dangers inherent in this test in that the testing of balance necessitates the conclusion that some testees would lose their balance (RT 82, 86). Were it otherwise, no "test" would occur, for it proves nothing scientifically or practically if all parties being tested are able to achieve a perfect score.

Plaintiff, on the other hand, was ignorant not only of the nature of the test but of its dangers. In the previous years in which he had volunteered his services to the United States Government in the conduct of the Thousand Aviators Study, the Graybiel-Fregly Ataxia Test had never been administered (RT 54). Therefore, he was completely unfamiliar with it, its results, and its dangers and justifiably relied on the persons conducting the test to administer it in a safe manner with protection from dangers inherent therein.

This, then, adds to the relationship of owner-occupier and invitee the fact that the owner-occupier is in a position of superior knowledge in a situation in which the invitee is relying on the owner-occupier for instructions, guidance and counselling in the conduct of these inherently dangerous tests.

By Dr. Fregly's own admissions the very purpose and nature of these tests were to find out at what point and how frequently the testees would lose their

balance under certain uniform conditions designed to induce the loss of balance (RT 48, 62, 78, 84). As outlined above, a test of balance would not be a test at all if it were not probable that some of the testees would in fact lose their balance. A test in which perfect results may be reached by all testees is not a test at all, but a mere recordation of man's normal, expected functions. From this, then, it is seen that it was not only within the realm of possibility that a person would lose his balance while taking the Graybiel-Fregly Ataxia Test, but it was a great probability that this would be so, and in fact this is what happened in the case of the plaintiff, who lost his balance, and fell to the rail, causing the injury complained of (RT 18, TR 2, 65).

Relating this back to the statement and requirements of the Florida Supreme Court in *Hall v. Holland,* supra, appellant was given neither the timely notice of or warning of latent and concealed perils which were known to the defendant and not known by appellant, nor did appellee fulfill his duty to keep the premises safe for invitees in the realm of things included within the invitation and which were necessary and convenient for the invitee to use or visit in the course of the business for which the invitation was extended. (See *Christopher v. Russell* (1912), 62 Fla. 191, 58 So. 45; Restatement of Torts, Sec. 343.)

From the records, as related above, we find uncontroverted facts which show that defendant was conducting a test of balance on a person who not only had no knowledge of the purpose and dangers of the

test, but of one who unknowingly was in an age bracket in which the dangers of losing one's balance were much greater than those for a younger person; that appellee knew of these dangers and understood them and did not warn appellant of them; that in instructing appellant in the manner in which to take the test, all possible means of restricting and eliminating appellant's natural balance maintaining faculties were removed; that the test itself was inherently dangerous since it required a person to walk on a very narrow metal rail without benefit of the use of a man's normal balancing aids, the extremities, and with the feet placed in an awkward position, a difficult task in itself even when not performed on a rail.

In addition to these factors, and will full cognizance of the above described dangers and a full realization of the fact that when a person is being tested for balance it is reasonable to assume that a few will lose their balance and in losing their balance it is even more reasonable to assume that some may fall, defendant made no attempt in any manner or in any way to guard against the possibility or probability of falls resulting from the loss of balance following as a normal, reasonable, expected result of the test, which falls were a natural consequence of the test being administered. Nor were any guard rails, hand rails, paddings, or other special attempts made to minimize the danger of injury once the fall occurred. Only one technician was in any proximity of plaintiff when he was taking the test and that person not only was too

far away to be of any assistance, but he was occupied and pre-occupied with the technical aspects of the administration of the test to each individual in that he was recording data and reviewing the list of things to be covered in the test (RT 13, 14, 80). Dr. Fregly was in the room supervising the conduct of the test, but was sitting behind a desk twelve feet away, was not watching for falls, did not see appellant fall, and could not have helped if he had (RT 80, 81).

In conclusion then we urge that the court look to the uncontroverted facts and find that, as a matter of law, defendants were negligent to the invitee who had volunteered his services for the benefit of the defendant in that they had placed him in a potentially dangerous situation which was fully appreciated by defendant's agents, and not appreciated or understood at all by appellant, without giving appellant any warning of these dangers, and that in so doing, they breached the duty which had arisen between appellant and appellee because of the inviter-invitee relationship. That as a proximate result of this breach, plaintiff was caused to lose his balance and to fall in a situation about which he had no warning and against which he was prevented from protecting himself by the nature of the test, thereby striking his hip upon the iron rail injuring himself in such a manner as to be crippled for life.

For these reasons and on these facts, we urge that defendant be held negligent as a matter of law in instructing plaintiff to take a test of balance, knowing that plaintiff was unaware of the dangers inherent

therein, in such a manner as to deprive plaintiff of his natural balancing safeguards without informing plaintiff of the danger and without making any provision to protect him from that danger.

III

GROUNDS FOR A MOTION FOR NEW TRIAL

Rule 60(b) of the Federal Rules of Civil Procedure (28 U.S.C. Rule 60) provides that the court may relieve a party from a final judgment for several reasons, one of which is "newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." It is well settled that this rule should be given a liberal construction in order to do justice and to prevent hardship upon the party. *Barber v. Turberville* (1954), 218 F.2d 34, 94 U.S.App.D.C. 335; *Laguna Royalty Co. v. Marsh* (1965), 350 F.2d 817.

It is generally held that motions for relief from final judgment on the grounds of newly discovered evidence are within the discretion of the trial judge. This discretion is not an arbitrary one, but must be based on a sound discretion guided by accepted principles. *Smith v. Stone* (1962), 308 F.2d 15, 17. In the case of *Stilwell v. Travelers Ins. Co.* (1964), 327 F.2d 931, at page 933, the court held that the trial court's refusal to grant relief from judgment on the grounds of newly discovered evidence because the trial court concluded that the moving party had only presented

a different opinion based on facts already presented in the original trial, constituted the application of an incorrect standard and an abuse of the trial court's discretion.

In the case at bar the plaintiff made a motion for a new trial on the grounds that he had discovered evidence of which he was ignorant at the time of trial and which he could not have discovered even with the exercise of due diligence. The new evidence had to do with three areas of testimony which are a part of the record (TR 70, 71, 72, 74, 75).

The first such area of testimony had to do with the question of the surface of the rail which plaintiff walked as a part of the test which he took during the Thousand Aviator Study. Had this evidence been introduced at the time of trial it would have established the fact that defendant had been negligent in conducting the test on a rail which was by its nature dangerous because there was no provision made to prevent slippage of the testee's foot or to maintain the rail in such a manner as to prevent the deterioration of such precautions (TR 72, 76).

For the second area of testimony, the evidence would show that contrary to the statement of the examiner, plaintiff and other witnesses had not been given written instructions on how to take the test. For that reason plaintiff was not warned and had no sufficient understanding of the nature and intrinsic dangers of the test as claimed by defense counsel (TR 72, 74).

The third area of testimony, would, if introduced, establish that defendant had conducted the test, not only in contravention of logic and reasonable standards of safe conduct, but also contrary to the instructions and the rationale of the person who had invented the test in that the test booklet requires that the test be given with the arms folded across the chest (TR 78); however, both plaintiff and another witness would testify that contrary to this instruction they were allowed to take test with his choice of either folding his arms across his chest or holding his arms flat against his sides (TR 74, 78).

Based on this new evidence, the court would have to find that defendant was negligent in administering this test. Therefore, since the evidence was substantial and was discovered in due course only after the trial through the diligence of plaintiff, we urge that the court was in error in rejecting the motion for a new trial thereon and request that the decision be reversed and a new trial be granted.

CONCLUSION

In weighing and analyzing the evidence outlined and described above, the following conclusions must be reached:

(a) Defendant deliberately, intentionally and knowingly tested plaintiff to the falling point with further knowledge that plaintiff was not aware of the purposes or dangers of this test;

(b) Defendant knew that by the very nature of the test, some testees *would* fall;

(c) Defendant afforded no warnings nor protection to the testees in the event of a fall;

(d) Defendant *should have known,* if defendant did not *in fact know,* that a fall would cause injury;

(e) Plaintiff did in fact fall while taking this test under the supervision of defendant and was injured as a proximate result thereof; and

(f) Defendant was therefore *negligent* as a *matter of law.*

The evidence before the trial court proved that the defendant was negligent as a matter of law and this appellate court should reverse the judgment of the trial court and direct it to find for the plaintiff on the issue of liability and to further try this case on the sole issue of damages.

If this appellate court cannot come to this requested conclusion upon this record, it should, and is hereby respectfully requested to, reverse the trial court's order denying appellant's motion for new trial

and order this case retried on all issues in the trial court.

Dated, Sacramento, California,
March 7, 1968.

Respectfully submitted,
PEASE, MAYHEW & KASSIS,
By JAMES E. KASSIS,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. KASSIS,
Attorney for Appellant.

No. 22,244

United States Court of Appeals

For the Ninth Circuit

GEORGE L. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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No. 22,244

United States Court of Appeals

For the Ninth Circuit

GEORGE L. SMITH,
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vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Eastern District of California entered on February 27, 1967, in favor of the appellee, United States of America.

Jurisdiction in the District Court was based upon the Federal Tort Claims Act (Title 28 U.S.C. § 1346(b) *et seq.*). Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant George L. Smith was among 1,056 naval aviators selected in 1940 as subjects for a medical study. The study was followed up in 1952, 1957 and

1963, and appellant took part in the study as a volunteer, although he was no longer in the service and was under no compulsion of any kind to do so.[1]

On May 21, 1963, appellant was in Pensacola, Florida, for the express purpose of taking continuing tests in the so-called Thousand Aviator Study described above.[2] One of the tests was the Graybiel-Fregly Posture Test, ". . . a baseline study of balance as a function, or as it changes, in aging."[3] There were several different stages of the posture test, the first of which was to stand on the floor for one minute with eyes closed, hands across chest and feet in a heel-to-toe position.[4] Appellant was given a perfect score on this part.[5] He was then instructed, orally and in writing, to walk as far as he could along a ¾ inch wide metal rail with a sandblasted top surface lying 2 and ½ inches above the floor.[6] He was to keep his eyes open, cross his hands over his chest and walk in a heel-to-toe, tandem fashion. He was told that he would have five trials and that he would be scored on the best three of the five trials since he could be expected to lose his balance at least two out of the five times.[7] Appellant proceeded to take his first trial, lost his balance and stepped off the rail.[8]

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[1]Reporter's Transcript, pp. 7, 25, 27, and 49-50.
[2]*Id.*, p. 10.
[3]*Id.*, p. 48.
[4]*Id.*, pp. 55-60.
[5]*Id.*, p. 67.
[6]*Id.*, pp. 72-73.
[7]*Id.*, p. 131.
[8]*Id.*, p. 109.

On the second attempt, appellant lost his balance again and then fell, in a manner that he was unable to establish in the trial below, thereby injuring himself.[9] After receiving inquiries and assistance from Dr. Fregly and the aide who had explained the test to him, appellant insisted on going ahead with the test and completed it.[10] At no time did appellant resist taking the rail test, before or after the fall, although he could have withdrawn from it at any time, as other volunteers had occasionally done.[11]

At least 740 people of many ages and capacities had taken the same test before May 21, 1963, without falling.[12]

On March 22, 1965, appellant filed a complaint for damages in the amount of $204,162 plus costs, and on February 27, 1967, judgment was entered against the appellant. Appellant's motion for a new trial was denied on April 24, 1967. Appellant now appeals from said judgment and from the order denying motion for new trial.

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[9] *Id.*, pp. 65-66.
[10] *Id.*, pp. 66-67.
[11] *Id.*, p. 50.
[12] *Id.*, pp. 74, 83.

ARGUMENT

(1) THE DISTRICT COURT'S FINDING THAT APPELLEE WAS NOT NEGLIGENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The substantive law of the State of Florida, where the accident occurred, is controlling in this case (Title 28 U.S.C. § 1346(b)). Under Florida law, the United States in this case owed appellant the same duty that any businessman owes his invitee: to warn him of any latent or concealed dangers on the premises. *Hall v. Holland* (Fla. Sup. Ct. 1950) 47 So.2d 889; *Andrews v. Goetz* (Fla. Sup. Ct. 1958) 104 So.2d 653. The invitor need not warn his invitee of obvious hazards nor of conceivably dangerous possibilities that a prudent person exercising due care would, on his own initiative, observe, comprehend and avoid. *Matson v. Tip-Top Grocery Co. Inc.,* 151 Fla. 247, 9 So.2d 366 (1942); *Crosier v. Joseph Abraham Ford Company* (Dist. Ct. Fla. 1963) 150 So.2d 723.

In this instance appellant had willingly agreed to take a series of tests. The nature and purpose of any test is that some will pass and some will fail—that some will do better than others. And the very nature and purpose of this particular test was that some of the volunteers would better maintain their balance while walking on the rail than others. Had a certain percentage of the subjects not lost their balance, the test would have had no meaning. Appellant must be charged with the obvious, even anticipated, possibilities of the situation, especially since he must have known it would be harder to maintain his balance

with his arms against his chest and his feet in a tandem, heel-to-toe position.

But aside from the self-evident aspects of the test, two additional circumstances make the case all the stronger for appellee. One is the fact that appellant was specifically told that he was taking a balancing test and that he would be scored only on the best three of five attempts. In effect, then, appellant was *told* that he would not be able to walk the full length of the rail in his first three attempts, even if appellant had not already figured that out for himself.[13]

The second factor militating against the claim of appellee's negligence is that appellant had already taken two stages of the equilibrium test before he fell. The first consisted of standing with eyes closed and feet in tandem position for sixty seconds. The second was appellant's *first trial* of the rail-walking test, when he presumably stepped from the rail without falling, as hundreds had done before him. Appellant should not only have *foreseen* the likelihood of losing his balance; not only was he *told* that he *would* lose his balance; he had, in fact, *experienced* it on the first trial, thereby removing from appellant's mind any mystery that might have shrouded the test before he took it. Having lost his balance once and taken the obvious precaution of stepping off the rail rather than letting himself fall, appellant should have been all the more prepared to do so on the second trial.

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[13] *Id.*, p. 131.

In view, therefore, of what he should have known by looking at the test situation, what he was in fact told about the test situation and what he actually experienced on his first attempt to walk the rail, appellant must be presumed to have been aware of the possible consequences of his taking the test. An ordinarily prudent person would, if anything, be especially alert and inquisitive in a new, experimental situation. Appellant's case is not that of the unwary painter falling from his invitor's defective awning that was seemingly safe to stand on (*Hall v. Holland, supra,* cited in Brief for Appellant, pages 11, 12 and 16). Nor is it the case of a ship chandler's customer falling into an unguarded and unmarked hole in a dark storeroom (*Christopher v. Russell,* 62 Fla. 189, 58 So. 45 (1912), cited in Brief for Appellant, page 16). If anything, appellant's case is analogous to that of the woman in *Matson, supra,* who turned and stepped directly from a lunch-counter stool to the floor, which was twelve and three quarter inches below the level of the platform edge on which the stool was mounted. In holding against the invitee, the Florida Supreme Court said at page 368 of the Southern Reporter:

> "The law does not require a proprietor of a public place to maintain his premises in such condition that an accident could not possibly happen to a customer. Plaintiff in turn was obligated to exercise a reasonable degree of care for her own safety . . . there is no duty to warn of an obvious condition which is not in itself dangerous."

Another opinion more applicable to appellant than the *Hall* and *Christopher* cases he cites is that of *Earley v. Morrison Cafeteria Co. of Orlando* (Fla. Sup. Ct. 1952) 61 So.2d 477, in which a plaintiff tripped over a one-half inch thick mat lying on a cafeteria floor. Agreeing that the mat may not have been easy to see, the court nevertheless stated at page 478 of the cited opinion that ". . . the proprietor has a right to assume that the invitee will perceive that which would be obvious to him upon the ordinary use of his own senses."

Not only did the test situation not contain latent or concealed peril, but it was not essentially dangerous at all. While it was inherent in the test that the subjects would often lose their balance, the probability of those subjects falling *after* they had lost their balance was not. The record shows that at least 740 persons had taken the test without falling: they had simply stepped off the rail on one side or another when they discovered they could walk no further, just as appellant had discovered on his first trial.

Appellant attributes great significance to the statistical results of the Graybiel-Fregly Test and theorizes from those results that appellant ran a much greater risk of falling than a younger man.[14]

But appellant's conclusions in this respect are unwarranted on two counts. First, the test results are statistical and have importance only in terms of aver-

[14]Brief for Appellant, pp. 14-18.

age group performance. As the trial judge noted,[15] the results cannot be applied to appellant as an individual and have nothing to do with appellant's own balancing skills, which could easily be greater or less than the norm. Second, one of the originators of the test, Dr. Fregly, testified at the trial that the difference between the capabilities of 17 to 42 year old men and men aged 43 to 50 with specific regard to the rail-walking phase of the test was relatively insignificant.[16] And the test results say nothing at all about the propensities of the test subjects to fall after losing their balance. Even in terms of the test itself, then, appellant's argument that there were special dangers in the test for appellant because of his age are patently unwarranted. Dr. Fregly's practical observation of the fact that hundreds of subjects of all ages and skills had walked the rail without falling is far more relevant to the resolution of this case than are the statistical results of the entire Graybiel-Fregly Posture Test.

In summary, therefore, appellee contends that it was not required under Florida law to protect appellant against all imaginable hazards that might arise in the test. Appellee's duty extended only to latent or concealed dangers, and there were no such dangers in this instance and very little danger at all in the usual sense of the word. All life is a danger if the definition is stretched far enough, but the law of

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[15]Reporter's Transcript, p. 113.

[16]*Id.*, p. 85.

Florida imposes a far more precise and limited standard on invitors, and appellee clearly fulfilled that standard with respect to Mr. Smith.

---

(2) IF THERE WAS ANY RISK IN THE TEST, APPELLANT ASSUMED SUCH RISK AS A MATTER OF LAW.

Appellant volunteered to travel to Pensacola for the tests; he was under no compulsion to do so, particularly since he received no compensation for his services other than out-of-pocket expenses. Once in Florida, he could have withdrawn from the tests at any time, and no one could have kept him there. Appellant could also have withdrawn at the point when he stood in the test room and faced the rail on May 21, 1963, and he could have refused to take the second trial walk along the rail after failing to complete the distance in his first trial.

In reality, however, the record clearly shows that appellant cooperated with the testing personnel and apparently showed no reluctance whatsoever in taking the phase of the test in which he fell. Appellant was so cooperative and willing, in fact, that he continued with the tests even after he fell.[17]

If there was any risk in this case, it was that the test subject would step off the rail so carelessly as to lose his footing on the wooden floor and fall. Such a risk was self-evident and Florida follows the general rule that an injured party must be held to be

[17] *Id.*, p. 67.

aware of an obvious risk even if the party had no actual knowledge of it. *Crosier v. Joseph Abraham Ford Company, supra.* Regardless of whether or not appellant actually knew, then, that he might fall when he stepped off the rail, he must be presumed to have known of the possibility and to have assumed that risk.

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(3) IF APPELLEE WAS NEGLIGENT, APPELLANT WAS CONTRIBUTORILY NEGLIGENT AS A MATTER OF LAW IN FAILING TO STEP OFF THE RAIL CAUTIOUSLY ENOUGH TO PREVENT HIMSELF FROM FALLING.

In the Florida Supreme Court case of *Tutwiler v. Beverly Nalle, Inc., et al.,* 152 Fla. 479, 12 So.2d 163 (1943), a prospective lessee of a building opened a cellar door and fell down a flight of stairs while inspecting the premises. Although the cellar steps were unmarked and unlighted, the court said that "The failure of the appellant to exercise ordinary care for her own safety when inspecting the property by opening a closed door and taking a step forward into a dark and unlighted stairway, thereby constributing to her own injury, as a matter of law, will preclude a recovery on her part . . ."[18]

In this instance, appellant failed to exercise the ordinary care that hundreds of people exercised before him when they stepped off the rail. As a result he fell and suffered an unfortunate accident for which appellee should not be held responsible. Addi-

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[18]12 So.2d at p. 164.

tional Florida cases denying recovery in factually similar cases involving contributory negligence are: *Bowles v. Elkes Pontiac Co.* (Fla. Sup. Ct. 1953) 63 So.2d 769, and *Andrews v. Goetz, supra.*

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(4) THE TRIAL JUDGE DID NOT ERR IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL WHEN, IN HIS OPINION, ALLEGEDLY NEW EVIDENCE OFFERED BY APPELLANT COULD HAVE BEEN DISCOVERED PRIOR TO THE ORIGINAL TRIAL AND WHEN SUCH EVIDENCE WOULD NOT IN ANY EVENT HAVE ALTERED HIS DECISION IN THE CASE.

Appellant moved for a new trial on the grounds that new testimony affecting appellant's case could be produced. The District Court concluded (1) that the purportedly new evidence could have been made available for the trial and (2) that had such evidence been produced, it would not have materially influenced the court's decision. The trial judge was properly acting within the broad discretion given him with respect to motions for new trial, and his action in denying the motion for new trial cannot be considered reversible error. "As the motion for new trial is addressed to the discretion of the trial court, . . . its ruling on such motion is not subject to reversal unless its order was made under the compulsion of a mistake of law, or it failed to exercise its discretion, or abused its discretion. . . ." (Footnotes omitted.) 6A Moore's *Federal Practice,* page 3773.

CONCLUSION

The question of whether appellee was negligent in its duties as a business invitor was a question of fact for the District Court to resolve. We submit that there is substantial evidence to support the court's decision in that regard. The evidence did not establish the existence of any latent or concealed dangers on the premises or in the situation in which appellant took the balancing test. Moreover, we submit that as a matter of law appellant assumed whatever risk was inherent in the test because the possible consequences of the test were self-evident and because appellant voluntarily took the test.

It was not error for the trial judge to deny appellant's motion for new trial when, in that judge's opinion, the evidence could not only have been produced in the trial but was insufficiently new or significant to change the result of the original trial.

We therefore submit that the judgment of the District Court should be affirmed.

Dated, Sacramento, California,
May 20, 1968.

Respectfully submitted,

JOHN P. HYLAND,
United States Attorney,
JAMES H. DAFFER,
Assistant United States Attorney,
Attorneys for Appellee
United States of America.

Certificate

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

James H. Daffer,
Assistant United States Attorney.

No. 22,244

IN THE

United States Court of Appeals

FEB 2 1969

For the Ninth Circuit

GEORGE L. SMITH,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

REPLY BRIEF FOR APPELLANT

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No. 22,244

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE L. SMITH,
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REPLY BRIEF FOR APPELLANT

INTRODUCTION

As seen from the Brief for Appellee, the parties herein are in accord in the point that the District Court had appropriate jurisdiction of this suit based on the Federal Tort Claims Act (Title 28, *U.S.C.*, Section 1346(b), and Sections 2671, et seq.). The parties also agree that this court has appellate jurisdiction under 28 *U.S.C.*, Section 1291.

However, several discrepancies appear in the appellee's recitation of the facts, beginning on page 2 of the Brief for the Appellee, under the heading "Statement of the Case" as follows:

1. On page 2 of Brief for Appellee, it is stated that the plaintiff ". . . was then instructed, orally and

in *writing* . . ." with regard to body positions and all other instructions relating to the tests in the Greybial-Fregley Test Battery. In support of this, appellee cites pages 72 and 73 of the Reporter's Transcript. These pages contain the testimony of Dr. Alfred R. Fregley, in which he states that written instructions were given to all testees before taking the test. However, there is no statement that plaintiff himself had received written instructions. Plaintiff in fact stated (R.T. 14) that the instructions were given to him verbally, and then later he stated that he did not recall ever having received or seen written instructions and that his memory was not refreshed by seeing a sample copy of said written instructions (R.T. 30-31).

This point, then, is in reality a question of fact in contention which was never specifically decided by the court and which appellee is not entitled to assume from the conflicting evidence. As a matter of fact, Joseph F. Sardoni, in his affidavit submitted to the court as partial grounds for a new trial, stated that he did not recall being handed any written instructions for this test (T.R. 73), and George Thomasini stated in a similar affidavit that "*oral* instructions were given."

2. The second fallacious assumption made in appellee's brief was that the plaintiff was told that he could be expected to lose his balance at least two out of the five times he took the test. For authority, appellee refers to page 131 of the Reporter's Transcript. There is no statement therein or anywhere else in plaintiff's testimony that he knew he would

lose his balance in two of the tests. The statements recorded there are simply an example of the court prompting Dr. Fregley by a series of leading questions to make *assumptions* about what Mr. Smith knew or did not know. There is no showing that defendant had or should have had any such knowledge, and from the facts in the record, appellee can neither assume that any such finding was made, nor can appellee assume that plaintiff had such knowledge. As a matter of fact, all that this testimony proves is that the *doctor himself knew* that a testee could be expected to lose his balance at least two out of the five times, and therefore, he and perforce, the government, had even a greater responsibility for the safety of his testees, which duty for safety was ignored and breached resulting in the injury to plaintiff.

3. Appellee then states on page 2 of his brief that the appellant proceeded to take his first trial, lost his balance, and stepped off the rail, citing as authority therefor, page 109 of the Reporter's Transcript. There is no statement nor inference on that page that plaintiff lost his balance and stepped off the rail on his first attempt to take this test. This is merely another example of appellee trying to assume facts with no testimonial basis, and for which no foundational basis had been laid.

4. Referring then to page 3 of appellee's brief, appellee states that the plaintiff was unable to establish in the trial below the manner in which he fell, and cites as authority therefor pages 65 and 66 of the

Reporter's Transcript. However, both of those pages report the testimony of Dr. Fregley as being examined by Mr. Shubb, and there is no statement therein by the plaintiff concerning the manner in which he fell or his ability or inability to describe it, nor did the court make any such findings as to circumstances surrounding this fall.

5. Appellee then further misstates the facts by a statement that plaintiff "insisted on going ahead with the test and completed it . . . ," citing as evidence therefor pages 66 and 67. However, a true statement, as reported in the record, is not that plaintiff in fact insisted on continuing, but that the doctor remembers that he said "that there was nothing here to prevent him from continuing the test, and he did so."

6. As a final example of appellee's misconstruing of the facts as reflected in the record, on page 3 of appellee's brief, appellee recites as a fact that 740 people took the test without falling, and cites as authority therefor page 74 and page 83 of the Reporter's Transcript. There is no such statement on either page 74 or page 83 that no one else of that 740 people had fallen. However, on page 75, Dr. Fregley does state that no one *to his knowledge* had ever fallen. The court made no finding of fact on this and it is improper for the appellee to assume and use this as authority for the unfounded premise that no one else had fallen, since the fact that the doctor did not *know* of anyone else falling does not establish that no one else actually fell.

ARGUMENT

In appellee's argument, beginning on page 4 of his brief, appellee correctly states the nature and purpose of the particular tests involved in this case and correctly states that by their very nature, the tests required that some people should fall. Appellee also correctly states the Florida law with relation to the obligation that an invitor has to an invitee. However, what appellee neglects to interject in this argument is the fact that appellant, in coming to the appellee for these tests, had put himself under the control of and in the hands of a person in superior knowledge of the intrinsic dangers of this test on the basic understanding that the person in control would not put him in any danger without prior warning. Dr. Fregley had designed this test, knew what its purposes, aims and functions were for, and had administered the test at least 740 times before. Plaintiff, on the other hand, had no information regarding the tests, had taken other tests on prior occasions and never been subjected to this particular test, and had no way of knowing the intrinsic dangers of the test as did Dr. Fregley. Thus arose the doctor's duty toward the testee (as stated with more particularity in appellant's brief), which duty was breached in the failure to take precautions necessary as outlined in appellant's opening brief. In addition to this, the *doctor knew* that the *plaintiff did not know* of the dangers. The plaintiff was entitled to rely upon the judgment of the doctor, since it is only natural for a person to rely on a doctor for guidance, especially

in areas affecting his personal physical safety and well being with relation to which a person has not had any experience or understanding.

Therefore, under the Florida law, the defendant-appellee is liable for negligence as a matter of law since there were latent or concealed dangers inherent in the test, as to which only the defendant and its agents had knowledge. The doctor, and thereby the defendant, breached this duty by not making an active, outright warning to the plaintiff and by not taking precautions against the injuries which could foreseeably result therefrom. By this breach of duty, the plaintiff was proximately and directly injured and has suffered damages therefrom, which damages he is now entitled to recover from the defendant.

On page 5, appellee's argument fails as a *non sequitur* based on proper deductions from an improper statement of facts on pages 2 and 3 of its brief. At no place in the transcript is there testimony which indicates that appellant was told that he would not be able to walk the full length of the rail in his first three attempts. The *non sequitur* results from deducing, or attempting to deduce, that the mere fact that plaintiff would be scored on three out of five tries would imply that he was told he would fail at least two times. In fact, all this implies is that it is possible to do it three times in a row without any misses, but that if something goes wrong a testee would be given two extra chances. Appellee again refers in the next paragraphs to plaintiff being *told*

that he would lose his balance, again a misstatement of the facts, and an erroneous, fallacious assumption.

On page 8 of its reply brief, appellee states that the age group performance results cannot be applied to the appellant as an individual and have nothing to do with the appellant's own balancing skills. Even if the above were correct statements of the facts, the appellee cannot deny that this knowledge must be attributed to the *doctor* and must raise in him a greater duty with relation to people in this age group, since he knows that the possibility is greater for people in that group to have less balancing ability or skill. His duty thus being greater, his breach is obviated even more.

In the concluding paragraph on pages 8 and 9 of appellee's brief it is contended that an invitor does not have a duty to guard an invitee from all imaginable hazards. It has never been appellant's contention that the defendant has to protect invitees against *any imaginable* hazards, let alone *all* imaginable hazards. However, it is the law in that state that *real* dangers must be protected against. Here the danger is real, as is seen from the fact that the accident happened. The hazard was hidden, known only to the doctor, and the plaintiff was in a situation wherein he had every right to rely on the judgment, care and watchfulness of the doctor for his protection, and therefore, was not put on notice that there was any danger by any of the subtle, extraneous facts surrounding him. The doctor, knowing these facts and

dangers, and ignoring them by not taking any steps to prevent the falls or to to prevent injury if a fall should occur, breached his duty, and in so breaching it, proximately caused the injury to plaintiff for which damages are herein being claimed.

With relation to the cases cited by appellee as being analogous to this case and upon which appellee predicates nonliability (*Matson v. Tip-Top Grocery Co., Inc.* (1943), 151 Fla. 247, 9 So.2d 366, cited by appellee at pages 4 and 6; *Farley v. Morrison Cafeteria Co. of Orlando* (Fla.Sup.Ct. 1952), 61 So.2d 477 cited by appellee at page 7, both of these cases are distinguishable from this case on an obvious and intrinsic ground. In those cases, the invitor had no greater duty imposed upon him by the relation of the parties or by his superior knowledge. In both cases the hazards which caused the injuries were open, obvious and avoidable by a person exercising normal care.

In this case, however, defendant's agents had a greater degree of care and responsibility since they had knowledge of the dangers of the tests to which plaintiff had no access. Plaintiff had placed himself at the disposal of defendant's agents for purposes of these tests. He had found from past experience that he would be well taken care of and had no reason to believe that precautions were any less stringent at the stage of testing in which he was injured.

In addition to knowledge of the hazards intrinsic in these tests, defendant's agents knew that plaintiff did not and *could* not know of them, because he had

no predictable knowledge of their design or purpose and had never taken them before. Defendant's agents should then have been placed on their guard and should have exercised even greater precautions in administering this test, all of which they failed to do.

Plaintiff did, and justifiably so, rely on defendant's agents to properly protect him to keep him from endangering himself and thereby subjected himself to the tests which he was requested to take.

Because of these dangers of which he had no warning and because of the failure to supply protective and preventive devices, plaintiff fell and was injured. These injuries and the damages sustained therefrom were the proximate and direct result of the negligence of the defendant's agents as outlined above and in appellee's brief. On this basis, defendant is, and should be found, negligent as a matter of law.

PARTS II AND III OF APPELLEE'S ARGUMENT

All of appellee's arguments and contentions relating to assumption of risk and contributory negligence in appellee's brief are irrelevant, immaterial, and superfluous and should be stricken therefrom. The court, in its findings of facts and conclusions of law, made no ruling with relation to either assumption of risk or contributory negligence. The court simply found that the plaintiff had failed to carry his burden in establishing the negligence of the defendant or any of its agents, servants or employees. Since no

finding was made by that court as to these two points, there is no basis for raising them on appeal, and therefore, all arguments relating to them are not only without merit, but cannot be considered here.

Therefore, the only issue to be determined and which may be argued is that of the negligence of the defendant, which under the facts, must be found as a matter of law.

Dated, Sacramento, California,
June 4, 1968.

Respectfully submitted,
PEASE, MAYHEW & KASSIS,
By JAMES E. KASSIS,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JAMES E. KASSIS,
Attorney for Appellant.

No. 22,248

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,*

v.

HAROLD C. and OLIVE B. ISAAK, *Appellees.*

On Appeal from the Judgment of the United States District Court for the Eastern District of Washington

---

BRIEF FOR THE APPELLANT

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---

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the court below is reported at 267 F. Supp. 595.

JURISDICTION

This appeal involves federal income taxes for 1957. On July 7, 1963, taxpayers paid a deficiency in their taxes for 1957 of $5,796.51 (R. 2, 38.) A timely claim for refund was thereafter filed which was rejected on

June 23, 1964. (R. 2, 4.) Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on March 21, 1966, taxpayers brought this timely action in the District Court for recovery of the taxes paid. (R. 1-3.) Jurisdiction was conferred on the District Court by 28 U.S.C., Section 1346(a). The judgment of the District Court in favor of the taxpayers was entered on June 5, 1967. (R. 41.) Within sixty days thereafter, on August 1, 1967, the United States filed a notice of appeal. (R. 42.) Jurisdiction is conferred on this Court by 28 U.S.C., Section 1291.

QUESTION PRESENTED

Did the District Court err in holding that a farmer-taxpayer who has elected under Section 77 of the Internal Revenue Code of 1954 to include in income amounts received as loans from the Commodity Credit Corporation may nonetheless exclude from income so much of the amounts as the taxpayer repays before the end of the taxable year in redemption of his crops held as collateral for such loans?

STATUTES AND REGULATIONS INVOLVED

The relevant statutory and regulatory provisions are set forth in Appendix A, *infra*.

STATEMENT

The facts as stipulated and found by the District Court are as follows:

Taxpayers are husband and wife who own a wheat

farm of approximately 3,000 acres in Grant County, Washington. (R. 37.) They report their income on a calendar year basis and maintain their books on a cash basis. (R. 26, 38.)

From time to time prior to the taxable year 1957, taxpayers borrowed money from the Commodity Credit Corporation, an agency of the United States Department of Agriculture, using their wheat crops as collateral. (R. 38.) Prior to 1957, taxpayers elected, pursuant to Section 77 of the Internal Revenue Code of 1954, to treat Commodity Credit loans as income on their tax returns, and that election was in effect for 1957. (R. 38-39.) During 1957 taxpayers received loans from the Commodity Credit Corporation in the total amount of $35,884.21. (R. 39.) On August 6, 1957, they borrowed the sum of $25,341.86 from the Commodity Credit Corporation and pledged, as collateral, wheat stored at a grain company in Hartline, Washington. (R. 32, 39.) On August 14, 1957, they borrowed the sum of $2,479.33 from the Commodity Credit Corporation and pledged as collateral wheat stored at a grain company in Coulee City, Washington. (R. 26, 33.) These loans were repaid by the taxpayers on December 5, 1957 and November 15, 1957, respectively, at which times the pledged crops were redeemed. (R. 26, 39.) Thereafter, and within the taxable year 1957, taxpayers sold a portion of the redeemed crops for $12,000. (R. 27, 39.)

Taxpayers reported as income on their joint 1957

tax return Commodity Credit loans in the amount of $7,749.10. They also reported as income the $12,000 received from the sale in 1957 of a portion of the redeemed wheat. (R. 39.) They also deducted all costs and expenses incidental to growing, harvesting and handling the wheat pledged as security to the Commodity Credit Corporation (R. 40) and the interest paid on the loans (R. 28). The wheat that was redeemed and not sold in 1957 was sold in 1958 and the amounts received were reported as income by the taxpayers in their 1958 return. (R. 40.)

The Commissioner in determining a deficiency for 1957 increased taxpayers' taxable income in the amount of $16,135.11, representing the unreported portion of the redeemed Commodity Credit loans. (R. 39.) The adjustment was computed as follows (R. 27, 40):

Commodity Credit loans received in 1957	$35,884.21
Commodity Credit loans reported in 1957	7,749.10
Unreported Income	$28,135.11
Less Redeemed Wheat Sales Reported	12,000.00
Adjustment to Income	$16,135.11

Taxpayers paid the deficiency and, following disallowance of their subsequent claim for refund, brought this action. (R. 25-26, 38.) The case was submitted for decision on an agreed statement of facts and judgment

ceived rather than waiting until the loan expires or the pledged commodity is redeemed and resold in a later year. The single issue in this case is whether an electing taxpayer who has received such loans may exclude them from income when, later in the same tax year, he chooses to repay the loan and redeem the crops pledged as collateral. The Government's position is that for an electing taxpayer a Commodity Credit loan must be treated as if it were a sale of the pledged crop upon execution of the loan, and that subsequent redemption of the crop cannot change the tax effect of the original transaction. The statute and its legislative history clearly intend that the sale analogy apply to farmers who make the permitted election, and to permit an electing taxpayer to alter the tax consequences of the original transaction by choosing later in the year to redeem his crops would distort the purpose of the statute and give the taxpayer an opportunity to manipulate income for reasons unrelated to the statute's remedial objective.

The present taxpayers had made their election to include Commodity Credit loans in income when received prior to 1957, and that election was in effect in 1957. At harvest time in the summer of 1957 taxpayers procured Commodity Credit loans for which they pledged portions of their wheat crop. After harvest, but before the end of the tax year, taxpayers chose to redeem some of the wheat posted as collateral for the loans. (R. 26.) Some of the redeemed wheat was sold in the

tax year and the rest in the next year (R. 27) and, although the record does not provide any insight into taxpayer's motives, it may be presumed that it was to their advantage to sell the wheat themselves at a price higher than the amount of the loan or to include at least a portion of the proceeds for their wheat in their income for the following year. Neither of these motivations suffice to permit a taxpayer to revoke a completed income transaction and avoid the tax effect of the prior election and receipt of income, and there is no reason grounded in the language or policy of Section 77 to permit the present taxpayers that freedom of action.

Section 77(a) provides that "Amounts received as loans from the Commodity Credit Corporation shall, at the election of the taxpayer, be considered as income and shall be included in gross income for the taxable year in which received." Section 77(b) provides that the election allowed by Section 77(a) "shall be adhered to with respect to all subsequent taxable years unless with the approval of the Secretary or his delegate a change to a different method is authorized." Thus the language of the statute specifies that it is the receipt of the proceeds of the loan that is the taxable event, and also that a taxpayer should enjoy no freedom to switch back and forth from reporting or not reporting loan amounts as he chooses without the approval of the Commissioner.

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The present taxpayers had made their election to include Commodity Credit loans in income when received prior to 1957, and that election was in effect in 1957. At harvest time in the summer of 1957 taxpayers procured Commodity Credit loans for which they pledged portions of their wheat crop. After harvest, but before the end of the tax year, taxpayers chose to redeem some of the wheat posted as collateral for the loans. (R. 26.) Some of the redeemed wheat was sold in the

tax year and the rest in the next year (R. 27) and, although the record does not provide any insight into taxpayer's motives, it may be presumed that it was to their advantage to sell the wheat themselves at a price higher than the amount of the loan or to include at least a portion of the proceeds for their wheat in their income for the following year. Neither of these motivations suffice to permit a taxpayer to revoke a completed income transaction and avoid the tax effect of the prior election and receipt of income, and there is no reason grounded in the language or policy of Section 77 to permit the present taxpayers that freedom of action.

Section 77(a) provides that "Amounts received as loans from the Commodity Credit Corporation shall, at the election of the taxpayer, be considered as income and shall be included in gross income for the taxable year in which received." Section 77(b) provides that the election allowed by Section 77(a) "shall be adhered to with respect to all subsequent taxable years unless with the approval of the Secretary or his delegate a change to a different method is authorized." Thus the language of the statute specifies that it is the receipt of the proceeds of the loan that is the taxable event, and also that a taxpayer should enjoy no freedom to switch back and forth from reporting or not reporting loan amounts as he chooses without the approval of the Commissioner.

The Commissioner treats a Commodity Credit loan transaction for income tax purposes as if it were a sale of the collateral upon execution of the loan and a repurchase of the collateral upon redemption. That analogy and the resulting tax treatment draw explicit support from the legislative history of Section 77 and from the inclusion in the basis provisions of the Code of a rule prescribing the electing farmer's basis in redeemed Commodity Credit loans. Section 1016(a)(8), Internal Revenue Code of 1954 (Appendix A, *infra.*) The purpose of these provisions was explained by the Senate Finance Committee in its report (S. Rep. No. 648, 76th Cong., 1st Sess., p. 8 (1939-2 Cum. Bull. 524, 529)), which accompanied the Revenue Act of 1939, c. 247, 53 Stat. 862, Section 223(a) of which added Sections 123 and 113(b)(1)(G) (the predecessors of 1954 Code Sections 77 and 1016(a)(8)) to the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed., Secs. 113, 123), as follows:

> The attention of your committee has been drawn to the fact that loans by the Commodity Credit Corporation to producers of agricultural commodities, on the security of such commodities, though in form loans, should be treated for income-tax purposes as though such commodities had been sold in the year of the loan for the amount of the loan. Nevertheless, existing law requires them to be treated as loans, with the result that when the pledged commodities are eventually sold taxpayers are required to take up a large amount of income and, in addition, will not longer have available to them their deductions on account of production

> expenses. In order to avoid this harsh result, section 223 of the bill adds a new section 49 to the Internal Revenue Code, giving taxpayers an election to treat such loans as income. An election once so made is binding as to all future years unless the Commissioner's approval is obtained to a change of method. Section 223 also adds a new section 113(b)1(G), providing for proper adjustments of basis in the event it ever becomes material to compute gain or loss upon a subsequent sale or other disposition of such commodities.

The sale analogy and the prohibition against changing one's mind after a transaction has been completed were spelled out even more clearly in the House debate on the Senate amendment which added Section 223(a) to the Revenue Act of 1939. Representative Cooper, spokesman in behalf of the amendment, explained (84 Cong. Record Part 7, p. 7804 (1939)):[1]

> Mr. Cooper. * * *
>
> * * *
>
> The next amendment appearing at the bottom of page 44 has to do with commodity-credit loans. It provides in simple terms that where a farmer places his products, cotton or whatever the product may be, in what is commonly termed the Government loan, he receives a loan on that product. This provides that so far as the question of taxes is concerned the transaction may be treated the same

---

[1] The full text of the House discussion of Section 223(a) of the Senate-passed bill is set forth in Appendix B, *infra*.

as the sale of that product so far as the amount of money he receives is concerned. The point, of course, is that a farmer might get a loan this year and his product continue in the Commodity Credit Corporation. Next year he might get a loan and so on. The result might be that, considered as a loan, the income would all come at one time, so far as the tax is concerned, and he might be required to pay a tax on the whole amount whereas he had been receiving these loans all along. The effect of this amendment is simply to treat these loans to the farmer so far as internal [sic] taxes are concerned the same as if it had been a sale.

* * *

Mr. August H. Andresen. In the case of corn, where a loan of 57 cents per bushel is made on the corn, and we will assume the market price is 40 cents, is it optional with the farmer to treat that loan either as a sale or as a loan?

Mr. Cooper. That is right.

Mr. August H. Andresen. It is optional with him?

Mr. Cooper. It is optional with the farmer, so far as the income tax is concerned, whether he wants to treat it as a loan or sale.

Mr. August H. Andresen. Assuming that he does treat it as a sale, but decides after he has made his return that he wants to treat it as a loan, and he loses 10 cents a bushel on the corn.

Mr. Cooper. He cannot do that. If he wants to exercise his own option and treat it as a sale and pay his income tax on the sale, then he cannot come

> back later and say, "I want to change it now and treat that as a loan and not as a sale." He has to do one or the other.

In further explaining the effect of a farmer's election to treat Commodity Credit loans as sales, Representative Cooper stated in response to a question that, although the bill permits a change of election upon the Commissioner's approval (see Section 77(b), Internal Revenue Code of 1954), "there is no permit to change with respect to the years in which the taxpayer has already elected to treat such loans as sales" and that "You cannot get a permit to change after you once exercise your option and elect." (84 Cong. Record, Part 7, p. 7804 (1939)). Consistent with this expression, the Regulation under Section 77 requires that an application for permission to make a change in the method of accounting in a year subsequent to the year in which the loans are first reported as sales must be filed within 90 days after the beginning of the taxable year. Treasury Regulations on Income Tax (1954 Code), Section 1.77-1 (Appendix A, *infra.*) Thus, without a formal application for permission to make the change, the farmer is presumed to have chosen to remain on the sales method of reporting the loans and that method must apply to all loans as they are received in the taxable year.

The basis provision, Section 1016(a)(8), Internal Revenue Code of 1954, establishes that Congress anticipated continued dealing between an electing farmer

and the Commodity Credit Corporation with respect to particular loans after they were first negotiated and provided for adjustments to basis to carry through the sale-repurchase analogy. Section 1016(a)(8) provides that basis adjustments shall be made "in the case of property pledged to the Commodity Credit Corporation, to the extent of the amount received as a loan from the Commodity Credit Corporation and treated by the taxpayer as income for the year in which received pursuant to section 77 * * *." Regulations Section 1.1016-5(e) (1954 Code) (Appendix A, *infra*) provides that "the basis of such property shall be increased by the amount received as a loan from such corporation and treated by the taxpayer as income for the year in which received under Section 77, * * *." The basis provisions of the Internal Revenue Code generally relate to "the sale or other disposition of property" (Section 1001(a), Internal Revenue Code of 1954) and their invocation necessarily implies a sale or exchange of property. The reference in the Senate report on the Commodity Credit loan provisions to "proper adjustments of basis in the event it ever becomes material to compute gain or loss upon a subsequent sale or other disposition of such commodities" (S. Rep. No. 648, supra, p. 8 (1939-2 Cum. Bull. 524, 529) demonstrates that the sale analogy was intended to continue throughout the transaction. A pertinent "subsequent sale or other disposition of such commodities" can only occur if the taxpayer redeems the pledged crop.

Under the Commodity Credit statutory provisions, if there is no redemption by the time the loan expires the transaction is at an end and the Government may dispose of the crop as it pleases, but without recourse to the borrower for any resulting deficiency. 7 U.S.C., Section 1425 (1964); *Autrey* v. *Commodity Credit Corp.,* 143 F. Supp. 550 (Ark., 1956).[2] It is therefore clear that an electing taxpayer has no occasion to recompute his basis in the crop unless he redeems it, and Congress has prescribed what that basis is upon redemption by treating the transaction as a sale and subsequent repurchase.

The taxpayers apparently do not contest the sale-repurchase analogy as it applies to loans redeemed after the taxable year in which they were made. However, there is no reason to consider a redemption within the taxable year of the loan as a different kind of transaction than a redemption in another taxable year. As a practical matter the transactions are the same except for the date on which they occur. There is no theory

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[2]Under the commodity credit program the farmer has the option of either repaying the loan by the maturity date and redeeming the pledged crop, or allowing the Commodity Credit Corporation to foreclose and sell it. In the event of foreclosure the farmer-borrower is not personally liable for any deficiency. Therefore no loss is deductible on account of a deficiency, and any excess received is includible in income in the year of receipt. See Regulations §1.77-2.

of taxation which supports a retroactive exclusion from income of items already received based upon events which occur later in the taxable year but which would not support retroactive exclusion if the same later event occurred in a different taxable year. That is, if redemption on January 1 of the taxable year following the year of the loan does not warrant exclusion of the amount from income on the date received, redemption on December 31 of the taxable year of the loan cannot, for any logical or policy reason, justify retroactive exclusion. In short, once the taxpayer elects under Section 77 to treat commodity credit loans as sales income, the election is binding unless and until permission to change such method of accounting is obtained from the Commissioner.

The opinion of the court below (R. 34-36) offers no independent analysis of the legal issue presented here; instead, the opinion briefly quotes from and summarily follows the holding of the Fifth Circuit in *Thompson* v. *Commissioner,* 322 F. 2d 122 (1963), a case which raised the very issue presented here. In *Thompson,* a majority of the court (Chief Judge Lumbard, sitting by designation, dissenting) concluded that an electing farmer would be deprived of his "free ride of the market" (*Id.,* p. 130) if the Commissioner's rule applied, and that the rule poses questions which the Court felt itself unprepared to answer regarding the "yet unexplored right to treat the second transaction not specified in Section 77—the redemption of the loan—as

a sale giving rise to a cost basis." (*Id.*, p. 131). In his dissent, Chief Judge Lumbard observed that once "the taxpayer made his election under § 77 to treat the loans as income at the time of receiving the proceeds of the loans there is no reason why he should not abide the consequences of that decision," that "there is no reason why the courts should relieve him of the consequences [of his election] for one year when it appears to him that it would be more advantageous not to treat the loans as income", and that "It is just as if a taxpayer sells his property, then buys it back and sells it again." *Id.*, p. 132.

The majority views in *Thompson* are vulnerable on two counts: first, the Government's position has no effect whatever on the policy behind the Commodity Credit program that farmers should enjoy flexibility in taking advantage of a fluctuating market, and second, the court made no reference to the explicit basis provision applicable to Commodity Credit loans (Section 1016(a)(8), Internal Revenue Code of 1954) and thus erroneously inferred that Congress had not considered or settled the taxpayer's right to assert a cost basis in redeemed crops. With respect to the farmer's market flexibility, the right to redeem pledged crops exists through to the maturity date of the loan irrespective of the farmer's treatment of the loan amounts for income tax purposes. Commodity Credit loans are made at a rate established at the beginning of the crop year, based upon the rates of the nearest Exchange. That rate

is not reduced during the crop year. At the time of the announcement of the support rate, the maturity date of loans is also announced, a date that always extends into the next calendar year. Not only may the farmer redeem the loan, but at any time prior to one month before the maturity date he may return any part of the redeemed loan in order to obtain another loan at the established rate. (R. 29.) Because these transactions may occur in taxable years after the year of the loan, their subsequent tax treatment must reflect the fact that the original amount of the loan was already reported as income. Thus upon redemption the farmer simply assumes a basis in the redeemed crop equal to the cost of the redemption, i.e. the amount of the loan previously reported as the "sale" price. His right to redeem, repledge, redeem, etc., depending on the market advantage to him in doing so, is unaffected by his inclusion of the original amount in income. If he sells the crop either in the taxable year of the loan or thereafter for an amount greater than his basis, that increment is additional income to him as of the date of sale. Likewise, if he sells at less than his basis, he realizes a reportable loss. In its apprehension regarding cost basis the court in *Thompson* failed to perceive that the problem is no different for a taxpayer who redeems after including the loan in income in the previous year than it is for a taxpayer who redeems in the taxable year of the loan. Since Congress did provide a statutory answer to the basis problem, although un-

acknowledged by the court in *Thompson,* there is no reason for concluding that the basis provision was intended to operate only in the event of redemption in the year following the year of the loan.[3]

The result reached in *Thompson* and followed by the District Court in the present case puts electing taxpayers in the novel position of being able to revoke their election at will (contrary to the express Congressional mandate in Section 77), assess their tax situation as each year comes to a close, and negate transactions which at the time entered into yielded reportable income. If, for example, an electing taxpayer anticipated a poor year compared to the year coming to an end, he could on December 31 redeem a Commodity Credit loan and exclude the amount from income in that year and repledge the crops on January 1 in anticipation of including the amount of the loan in income in the later taxable year. The advantageous apportioning of gross income into various tax years

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[3] The Government must bear some responsibility for the failure of the court in *Thompson* to refer to Section 1016(a)(8). Although the Government asserted in its brief in *Thompson* that a redeeming farmer assumes a cost basis in the redeemed crop equal to the amount of the redemption, the assertion was not supported by a citation to Section 1016(a)(8). See page 35 of Brief for the Respondent in *Thompson* v. *Commissioner,* 322 F. 2d 122 (C.A. 5th, 1963), relevant excerpts of which were appended to the Government's brief in the District Court in the present case.

should not be a consideration for the redemption of Commodity Credit loans; an electing taxpayer must understand that once he elects under Section 77 to treat the loans as income, he realizes taxable income upon receipt of loan proceeds in the year of receipt, just as if he had sold the pledged crops. Moreover, this result is not as inconsistent with the Commodity Credit loan program as the Fifth Circuit suggested in *Thompson, supra.* A Commodity Credit loan is essentially a guarantee to the farmer that he will realize on the pledged crop *at least* the amount of the loan, for if the loan is not redeemed by the maturity date the Corpora-

tion's recourse is only to the pledged crop. 7 U.S.C. Section 1425. Thus, as a practical matter, the loan is more in the nature of a sale for a guaranteed minimum rather than a standard debt transaction in which the borrower simply pays interest for the use of principal over a given period of time.[6]

---

[6]The sale analogy, however, is not carried through to affect the character of interest payments made by the taxpayer who redeems a pledged crop. The present taxpayers paid interest when they redeemed their crops (R. 31A, 32A) and deducted those payments in their 1957 return (R. 28). That deduction was not challenged by the Commissioner. It is to be noted that interest is due upon redemption in whatever year redemption occurs, but that upon foreclosure no interest is paid. (R. 29-30.) Thus, the allowance of the interest deduction to the present taxpayers is no different from the treatment given taxpayers who redeem in a subsequent tax year, i.e., taxpayers as to whom the sale-repurchase analogy without question applies, as the court in *Thompson* conceded.

Generally speaking, the repurchase of property by a seller does not negate the original transaction so long as the original sale and the repurchase transactions were bona fide. *Weir* v. *Commissioner,* 109 F. 2d 996 (C.A. 3d, 1940), certiorari denied, 310 U.S. 637; *Patterson* v. *Motter,* 55 F. 2d 692 (Kan., 1931); *Abbot* v. *Welch,* 31 F. Supp. 369 (Mass., 1940). A repurchase of property in the same tax year as the original sale is not treated as a recission of the sale and does not mitigate the gain or loss realized on the sale. *Branum* v. *Campbell,* 211 F. 2d 147 (C.A. 5th, 1954); *Bancitaly Corp.* v. *Commissioner,* 34 B.T.A. 494 (1936); *Metropolitan Commercial Corp.* v. *Commissioner,* decided April 25, 1963 (22 T.C.M. 533). There is no basis in the statutory language or the legislative history of Sections 77 and 1016(a)(8) for concluding that these rules do not apply to Commodity Credit loans which Congress has determined should be taxed as sales upon the taxpayer's election to so treat them.

CONCLUSION

The judgment of the District Court should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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Of Counsel:
SMITHMOORE P. MYERS,
United States Attorney.
February, 1968.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated: _____ day of _____, 1968.

_____
United States Attorney

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Dated: _____ day of _____, 1968.

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United States Attorney

(a) If a taxpayer elects or has elected under section 77, section 123 of the Internal Revenue Code of 1939, or section 223(d) of the Revenue Act of 1939 (53 Stat. 897), as amended, to include in his gross income the amount of a loan from the Commodity Credit Corporation for the taxable year in which it is received, then—

(1) No part of the amount realized by the Commodity Credit Corporation upon the sale or other disposition of the commodity pledged for such loan shall be recognized as income to the taxpayer, unless the taxpayer receives an amount in addition to that advanced to him as the loan, in which event such additional amount shall be included in the gross income of the taxpayer for the taxable year in which it is received, and

(2) No deductible loss to the taxpayer shall be recognized on account of any deficiency realized by the Commodity Credit Corporation on such loan if the taxpayer was relieved from liability for such deficiency.

* * *

(26 C.F.R., Sec. 1.77-2.)

§ 1.1016-5 *Miscellaneous adjustments to basis.*

* * *

(e) *Loans from Commodity Credit Corporation.* In the case of property pledged to the Commodity Credit Corporation, the basis of such property shall be increased by the amount received as a loan from such corporation and treated by the taxpayer as income for the year in which re-

ceived under section 77, or under section 123 of the Internal Revenue Code of 1939. The basis of such property shall be reduced to the extent of any deficiency on such loan with respect to which the taxpayer has been relieved from liability.

* * *

(26 C.F.R., Sec. 1.1016-5.)

APPENDIX B

84 Cong. Record, Part 7, pp. 7804-7805:

Mr. COOPER. * * *

* * *

The next amendment appearing at the bottom of page 44 has to do with commodity-credit loans. It provides in simple terms that where a farmer places his products, cotton or whatever the product may be, in what is commonly termed the Government loan, he receives a loan on that product. This provides that so far as the question of taxes is concerned the transaction may be treated the same as the sale of that product so far as the amount of money he receives is concerned. The point, of course, is that a farmer might get a loan this year and his product continue in the Commodity Credit Corporation. Next year he might get a loan and so on. The result might be that, considered as a loan, the income would all come at one time, so far as the tax is concerned, and he might be required to pay a tax on the whole amount whereas he had been receiving these loans all along. The effect of this amendment is simply to treat these loans made to the farmer so far as internal taxes are concerned the same as if it had been a sale.

Miss SUMNER of Illinois. Will the gentleman yield?

Mr. COOPER. I yield to the gentlewoman from Illinois.

Miss SUMNER of Illinois. We over here are wondering if that paragraph is complete enough

to permit him to deduct when he makes payment in the following year as a loss, if he has one?

Mr. COOPER. Oh, yes; it permits the deduction of a loss.

Mr. AUGUST H. ANDRESEN. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from Minnesota.

Mr. AUGUST H. ANDRESEN. In the case of corn, where a loan of 57 cents per bushel is made on the corn, and we will assume the market price is 40 cents, is it optional with the farmer to treat that loan either as a sale or as a loan?

Mr. COOPER. That is right.

Mr. AUGUST H. ANDRESEN. It is optional with him?

Mr. COOPER. It is optional with the farmer, so far as the income tax is concerned, whether he wants to treat it as a loan or sale.

Mr. AUGUST H. ANDRESEN. Assuming that he does treat it as a sale, but decides after he has made his return that he wants to treat it as a loan, and he loses 10 cents a bushel on the corn.

Mr. COOPER. He cannot do that. If he wants to exercise his own option and treat it as a sale and pay his income tax on the sale, then he cannot come back later and say, "I want to change it now and treat that as a loan and not as a sale." He has to do one or the other.

Mr. AUGUST H. ANDRESEN. Then title would in reality pass to the Government?

Mr. COOPER. This does not make any difference so far as title is concerned. This treats it as far as income-tax payment is concerned whatever way he wants to treat it.

Mr. AUGUST H. ANDRESEN. It seems to me this is going to be rather hard on the cotton farmers who have so much cotton in loan with the Government.

Mr. COOPER. As long as it is optional, I do not see how it could hurt anybody.

Mr. BUCK. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from California.

Mr. BUCK. Here is the advantage to the farmer, I may say to the gentleman from Minnesota: If he treats it as a sale in the year in which he gets a loan, he may then deduct and charge off against the amount the cost of production, which he never could charge off if he waited until the loans were liquidated in another year.

Mr. AUGUST H. ANDRESEN. That is true.

Mr. COOPER. That is one definite advantage. It gives him the opportunity of charging off his expenses and his cost at the time he asks that it be treated as a sale.

Mr. AUGUST H. ANDRESEN. At the present price levels, very few farmers have any income tax.

Mr. THOMASON. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from Texas.

Mr. THOMASON. Is there any change in the excise tax on copper?

Mr. COOPER. No; no change in that.

Mr. CRAWFORD. Will the gentleman yield?

Mr. COOPER. I yield to the gentleman from Michigan.

Mr. CRAWFORD. How does this amendment apply to those who have during the last 3 years, say, put cotton into loan and who have not yet reported that as income? They treated it as a loan at the time and it has not been reported as income.

Mr. COOPER. They can go back, if they want to, and treat that as income received at the time the loan was made.

Mr. CRAWFORD. Through amending their tax returns?

Mr. COOPER. That is right.

Mr. CRAWFORD. Insofar as the subsequent returns are concerned, as I understand the gentleman's explanation, this will operate almost exactly as making returns on the basis of an accrual or on the basis of cash income and outgo. In other words, having made the decision to report the income on the basis of accrual, they have to stick to that plan unless they get permission to change.

Mr. COOPER. That is correct.

Mr. CRAWFORD. And this will operate in a similar manner?

Mr. COOPER. That is correct, but there is no permit to change with respect to the years in which the taxpayer has already elected to treat such loans as sales.

Mr. CRAWFORD. I say, you will have to get the permit from the Commissioner?

Mr. COOPER. You cannot get a permit to change after you once exercise your option and elect.

Mr. CRAWFORD. In subsection (b) it is stated:

> Unless with the approval of the Commissioner a change to a different method is authorized.

Mr. COOPER. Yes; that is true. I beg the gentleman's pardon. But that only applies to future years.

Mr. CRAWFORD. That would be the same whether it is on an accrual or a cash basis?

Mr. COOPER. The gentleman is correct.

Mr. CRAWFORD. One other question. Having reported the loan money received, say, in 1939 as income, and then in 1940 at the time the loan is closed out it developing that there is an additional payment to be made to the farmer as a result of the sale of the products at a higher price

than the loan amounted to, the farmer will at that time include the additional amount as income?

Mr. COOPER. Yes; that is correct.

Mr. KERR. Mr. Speaker, will the gentleman yield?

Mr. COOPER. I yield to the gentleman from North Carolina.

Mr. KERR. This tax would have to be collected only at one time, whether it is considered as a sale or a loan?

Mr. COOPER. The gentleman is correct.

Mr. KERR. And if he continued to negotiate his loan after he had paid the tax one time, for the first loan, he would not have to pay it if he negotiated his loan in subsequent years on the same crops?

Mr. COOPER. Oh, no; of course not.

APPENDIX C

Table of Exhibits pursuant to Rule 18(2)(F) as amended:

Exhibits 1 and 2 were identified and admitted in evidence as set forth in the Pre-Trial Order and Agreed Facts. (R. 24-31.) The exhibits are identified at pages 26-27 of the Record and appear at pages 31A through 33 of the Record.

IN THE

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For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

v.

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Appellees.

No. 22,248

BRIEF FOR THE APPELLEES

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OPINION BELOW

The Opinion of the Court below is reported 267 F. Supp. 595.

JURISDICTION

This Appeal involves Federal Income Taxes for 1957. On July 7, 1963, taxpayers paid a deficiency in their taxes for 1957 of $5,796.51 (R. 2, 38). A Timely Claim for Re-

fund was filed, which was rejected on June 23, 1964 (R. 2, 4). Within the time provided in Section 6532 of the Internal Revenue Code of 1954, on March 21, 1966, taxpayers brought a timely action in the District Court for recovery of the taxes paid (R. 1-3). Jurisdiction was conferred on the District Court by 28 U.S.C. § 1346(a). The judgment of the District Court in favor of the taxpayer was entered on June 6, 1967 (R. 41). Within 60 days thereafter, on August 1, 1967, the United States filed a Notice of Appeal (R. 42). Jurisdiction is conferred on this Court by U.S.C. § 1291.

QUESTION PRESENTED

Was the District Court correct in holding that a farmer-taxpayer, who has elected under Section 77 of the Internal Revenue Code of 1954 to include in income amounts received as loans from the Commodity Credit Corporation, may exclude from income amounts repaid before the end of the taxable year in redemption of his crops?

STATUTES AND REGULATIONS INVOLVED

The relevant Statutes and Regulations involved are set forth in Appendix A of Appellee's Main Brief.

STATEMENT

The entire facts were stipulated and agreed to prior to Argument in the District Court. The facts, as stipulated and found by the District Court are as follows:

Taxpayers are husband and wife, residents of Coulee City, Washington, who own a wheat farm of approximately 3,000 acres in Grant County, Washington, which they have farmed since approximately 1929 (R. 37).

For the taxable year 1957 the Appellees filed a timely Federal Income Tax return with the District Director of Internal Revenue for the District of Washington and paid the tax shown as due thereon (R. 28).

Subsequent to the time that the Appellees filed their Federal Income Tax return for the taxable year 1957, the Commissioner of Internal Revenue, by and through his agents, conducted an audit and investigation of the said income tax return (R. 38).

By registered letter dated November 28, 1962, the Commissioner of Internal Revenue notified the Appellees that he was asserting a deficiency in Federal Income Tax for the taxable year 1957 in the amount of $5,976.51. The Commissioner's determination was based upon the assertion that the taxpayers had realized income from the sale of grain in the taxable year 1957 (R. 38).

In response to the assertions by the Commissioner of Internal Revenue, as set out above, Appellees, on or about the 7th day of July, 1963, paid the Commissioner the sum of $5,796.51. Thereafter, Appellees filed with the District Director of Internal Revenue for the District of Washington in Tacoma, Washington, a timely Claim for a refund of Federal Income Taxes for the taxable year

1957, requesting a refund in the total amount of $5,796.51, plus interest as provided by law (R. 38).

Appellees from time to time, in the years prior to the taxable year 1957, borrowed money from the Commodity Credit Corporation, a part of the United States Department of Agriculture and used wheat as collateral. Prior to the taxable year 1957, Appellees treated the Commodity Credit loans as income on their Federal Income Tax returns as filed for said prior taxable years if the loan had, in fact, not been repaid prior to the end of said taxable year. Appellees have always maintained their book and records on a cash basis (R. 38).

In the operation of the wheat farm, Appellees harvest the wheat in July and August of each year. The wheat is either stored at home, or commercially in the State of Washington. Some of the wheat is sold either prior to harvest or after harvest. The proceeds from the sale of wheat have always been reported by the Appellees on their Federal Income Tax Returns (R. 39).

During the taxable year 1957, Appellees made loans from the Commodity Credit Corporation in the amount of $35,884.21 (R. 39).

On the 6th day of August, 1957, Appellees borrowed the sum of $25,341.86 from the Commodity Credit Corporation and pledged, as collateral, wheat that was stored in the Farmer's Union Grain Company, Hartline, Washing-

ton. This loan was repaid December 5, 1957, and the wheat returned to Appellees (R. 39).

The Appellees, on their 1957 Federal Income Tax return reported Commodity Credit loans in the amount of $7,749.10. Of the wheat that was redeemed from the Commodity Credit Corporation in the year 1957, as set forth above, the Appellees actually sold $12,000.00 worth of wheat and reported the $12,000.00 as income on their Federal Income Tax return as filed for the taxable year 1957 (R. 39).

The Appellees did not report, as income in the taxable year 1957, the remaining portion of the loans from the Commodity Credit Corporation which had been repaid prior to the taxable year 1957 (R. 39).

The Commissioner of Internal Revenue, in auditing the appellee's 1957 Federal Income Tax return, increased Appellee's taxable income for said taxable year in the amount of $16,135.11, upon the theory that all of the loans from the Commodity Credit Corporation should have been reported as income and the fact that some of the loans had been repaid prior to the end of the taxable year did not change the tax picture. In essence, the Internal Revenue adjustment was computed as follows: (R. 39)

Commodity Credit loans received in 1957	$35,884.21
Commodit Credit loans reported in 1957	7,749.10
Unreported Income	28,135.11
Less Redeemed Wheat Sales Reported	12,000.00
Adjustment to Income	16,135.11

The wheat that was redeemed from the Commodity Credit Corporation by repayment of the loans in 1957, and not reported as income in the taxable year 1957, was sold by the Appellees in the taxable year 1958 and the income from the said wheat was reported on the Appellee's 1958 Federal Income Tax return as filed and the tax due thereon timely paid (R. 40).

During the taxable year 1957 Appellees deducted all costs and expenses incidental to growing, harvesting and handling the wheat that was placed with the Commodity Credit Corporation in August of 1957 as security for the loans set forth above. Appellee also deducted as an interest expense during the taxable year 1957 the interest paid the Commodity Credit Corporation when the loans were redeemed in December of 1957 in connection with the repayment of the loans on the wheat which had been made earlier (R. 40).

The District Court, in holding for the Appellees, found that the Commodity Credit loans which the Appellees repaid during the taxable year 1957 were not income for the Appellees for said taxable year relying upon *Thompson v, Commissioner* (CA-5, 1963) 322 F.2d 122.

SUMMARY OF ARGUMENT

The Appellant, in his Summary of Argument (Appellant's Brief p. 5 and 6), asserts that the Federal District Court erred in this case.

Basically, the question is simple. Appellee-Taxpayer borrowed money from the Commodity Credit Corporation during the taxable year 1957. Prior to the end of the said taxable year two loans were repaid. For prior years Appellee had reported income under Section 77 of the Internal Revenue Code which provides that such loan shall at taxpayer's election, be treated as income for the year in which received, which election shall be binding for subsequent taxable periods.

The Federal District Court held that repayment of the loan did not result in income to the Appellee-Taxpayers where the amounts of the loan had been redeemed prior to the end of the taxable year (District Court Opinion).

ARGUMENT

A TAXPAYER WHO ELECTS TO REPORT COMMODITY CREDIT LOANS AS INCOME IN THE YEAR RECEIVED MAY EXCLUDE FROM INCOME LOANS RECEIVED AND LATER REPAID IN THE SAME TAXABLE YEAR IN REDEMPTION OF PLEDGED COMMODITIES.

The basic issue involved in this controversy is very simple. Appellee-Taxpayers borrowed money from the Commodity Credit Corporation in 1957. Prior to the end of the taxable year 1957, Appellee-Taxpayers repaid some of the loans. In computing their Federal Income Tax for the taxable year 1957 Appellee-Taxpayers included as income the loans from the Commodity Credit Corporation which had not been redeemed prior to the end of the taxable year.

Section 77 of the Internal Revenue Code of 1954 entitled "Commodity Credit Loans" provides as follows:

> (a) *Election to Include Loans in Income.* — Amounts received as loans from the Commodity Credit Corporation shall, at the election of the taxpayer, be considered as income and shall be included in gross income for the taxable year in which received.
>
> (b) *Effect of Election on Adjustments for Subsequent Years.* — If a taxpayer exercises the election provided for in subsection (a) for any taxable year, then the method of computing income so adopted shall be adhered to with respect to all subsequent taxable years unless with the approval of the Secretary of his delegate a change to a different method is authorized.

The election, referred to above, under Section 77 of the Internal Revenue Code is made by treating loans as income on the Federal Income Tax returns as filed. No formal election is provided for.

Appellees, prior to 1957, had treated Commodity Credit loans as income if the loan had *not* been repaid prior to the end of the taxable year. 1957 was no different than prior years. At the end of the taxable year 1957, the Appellees had *repaid* some of the loans which they had taken from the Commodity Credit Corporation. The loans repaid were *not* reported as income. Some of the wheat used as collateral for the loans was sold in 1957 and the income from said sale reported in that taxable year. The remainder of the wheat which had been used as collateral for the

1957 loans was sold in 1958 and the Federal tax paid in that taxable year.

The Appellees contend that the Commodity Credit Corporation loans that were repaid during the taxable year were *not* income to the Appellees for said taxable year.

The Appellant, on the other hand, contends that the Appellees elected to treat the Commodity Credit Loans as income under Section 77 of the Internal Revenue Code and that having chosen to report their income in this manner they must treat all loans consistently.

There is only *one* case considering the identical question presented herein.

In *Thompson v. Commissioner,* (C.A.-5, 1963) 322 F. 2d 122, rev'g in part, (1962) 38 Tax Court 153, the Court stated as follows:

> "Concerning the problem under 26 U.S. C.A. Section 77, the facts are uncontradicted. Taxpayer was on a cash basis. He had never used crop inventories in computing farm income. In years prior to 1958, Taxpayer had sometimes put his wheat under parity price support loans with Commodity Credit Corporation. Having reported some of these loans as income in prior years, he had elected to treat loans as income under Section 77. In July of 1958 Taxpayer put two identified lots of wheat under CCC loans aggregating $15,486.06. In December of 1958, acting on advice or opinions of a probabale rise in the wheat market, Taxpayer repaid the loans as to the two lots and redeemed the wheat. The wheat was on hand at the year's end. No income was reported for the disposi-

tion of these lots. This redeemed wheat was sold in January 1959 and reported as income for that year. Costs incurred in growing and harvesting it were taken as a deduction in 1958.

"The Tax Court determined that the CCC loan was taxable as income in 1958 even though the loan was repaid and the wheat redeemed before the end of the taxable year. Considering the background of this legislation, we do not think that the result urged by the Government and sustained by the Tax Court is essential to achieve the end sought by Section 77. Worse than that, it opens up new and vexing problems— conceptual and administrative—perhaps requiring the judicial creation of a new and counter-fiction to offset this consequence of the congressionally created fiction that a loan is income."

The Court then explained the purpose of Section 77 of the Internal Revenue Code. In so doing it stated as follows:

"This section was not enacted as a revenue measure. It was not passed to increase the revenue. Indeed, in operative effect, its consequence is just the opposite. Rather, a very small piece to fill out a beneficent and comprehensive program of farm relief, it was enacted to overcome an unintended, but conceptually inescapable, adverse effect on the objects of congressional aid. Under farm legislation the so-called crop loans are an integral, vital part of the scheme of price supports.

"Without any effort to describe accurately the operation of this complex program, the general purpose of the crop loan is to enable the farmer to obtain as a minimum, and in cash, the support price for his crop while giving him a free ride of the market for possible market price advances until expiration of the redemption period. As conceived and practiced, it is, and is intended to be, a major source of governmental

> farm support payments. But for these grants, the Government, as the so-called lender, must look solely to the crop as collateral security with no personal liability on the borrower."

The Government in the *Thompson* case argued that the taxable event was the *receipt of the loan,* regardless of what took place thereafter, and that the so-called *"election requirement"* showed a congressional purpose to exact consistency of farmers so that they could not play fast and loose as shifts occurred in the commodity markets.

The Court in the *Thompson* case pointed out that the taxpayer had faithfully adhered to his election, i.e., wheat loans not redeemed at the end of the taxable year had in fact been included in income. The Court stated further in answer to the Government's contentions as follows:

> "Actually, the construction now asserted would defeat the paramount aim of Congress. Farm legislation was intended to give farmers a free ride of the market. However, the inescapable income tax rulings prevented that when the loan and the redemption (or foreclosure) overlapped two tax years. This was the problem, and the only problem. There was no problem as to a loan received and repaid within the same year. If the Government's view is accepted, it means that as to an area in which there was no problem, Congress has unwittingly withdrawn from that farmer the right to ride the market to the year's end. Thus an amendment to the Revenue Code designed to 'avoid this harsh result' (see note 18, supra) becomes itself a new instrument to frustrate the predominate goal of agricultural relief.

In reviewing the *Thompson* case the District Court adopted the following statement: (R. 36).

> *"The Facts in simple outline convince us that Taxpayer is right.* At year end 1958 Taxpayer had the wheat. He did not have money. In 1959 he had money, but no wheat. Section 77 does not prescribe that the loan *is* income. It prescribes that it should be 'considered as income' and when so done, the 'method of computing income so adopted shall be adhered to * * *.' This terminology and the interpretation we put on it achieves several ends. It adheres to the annual accounting concept of income tax law. It makes possible the payment of the tax in the year in which the income is realized with which to pay the tax. It eliminates either the peril or problems of the taxpayers being taxed in successive years on the same wheat crop, and it eliminates vexing problems on collateral elections." (Emp. Supp.)

The facts in the instant case are identical to the facts in the *Thompson* case. Here, Appellees reported on their 1957 Federal Income Tax return as filed, loans made from the Commodity Credit Corporation which were outstanding at the end of said taxable year. As to loans redeemed prior to the end of the taxable years, Appellees did not include those on the Federal Income Tax returns as filed. As in the *Thompson* case, Appellee-Taxpayers at the end of the year 1957 *had wheat.* They did not *have money.* In 1958 they *had money* but *no wheat.* They have, as the Court in the *Thompson* case indicated, "Faithfully adhered to their election."

Here, as in *Thompson,* Appellees were on a cash basis of accounting. Appellant's position would place them on an inventory basis. The District Court's ruling adheres to the annual accounting concept of income tax law and allows the Appellees to pay their tax when the income is received.

Appellant's Main Argument (Appellant's Brief p. 6 through 21), appears to be two-fold:

1. The Fifth Circuit Court of Appeals was wrong in *Thompson v. Commissioner* (1963) 38 T.C. 153 reversed, (C.A.-5th, 1963) 322 F.2d 122, and

2. Section 1016(a) (8) of the Internal Revenue Code of 1954 was over-looked by the Court in deciding the *Thompson* case.

The Appellant first refers to the legislative history of Section 1016(a) (8) of the Internal Revenue Code (Appellant's Main Brief p. 9 to 13 incl.). The Committee reports referred to by the Appellant all refer to an election which is binding as to *all future years* (Appellant's Main Brief p. 10). It is submitted by the Appellee that nowhere in the Legislative History, cited in Appellant's Main Brief, is there a situation concerning two transactions in the same taxable year.

It is true that once a taxpayer elects under Section 77 to treat Commodity Credit loans as sales income, the election is binding in all future years *unless* and *until* the permission to change such method of accounting is obtained from the Commissioner. But, this reasoning does not hold true where as here, the Appellee-Taxpayer had *all* of their transactions in the same taxable year.

It would seem rather presumptious to Appellees that the Appellants would assume that the Court of Appeals over-

looked a section of the Internal Revenue Code *if* that section of the law was germaine to the issue involved (Appellant's Main Brief p. 18).

It is noteworthy that Section 1016(a) (8), relied upon so emphatically by Appellant, was *also* overlooked by the Tax Court of the United States in its Opinion. Appellant, however, fails to mention this fact.

The answer is obvious. Section 1016(a) (8) is contained in the Internal Revenue Code of 1954 under the general heading of "Basic Rules of General Application". The entire chapter applies to basis of property *sold* or *exchanged*. Section 1016(a) (8) was enacted to cover the situation where "A" pledged wheat as collateral in 1958, paid the tax under Section 77, redeemed the wheat in 1959, and later sold it. There must be a provision insuring, under the facts of the above example, that the pledged wheat would not be taxed twice. Section 1016(a) (8) is that insurance.

Section 1016(a) (8) has nothing whatsoever to do with the question presented in this case, i.e., whether wheat redeemed in the year of the loan is taxable under the provisions of Section 77 of the Internal Revenue Code of 1954.

In the instant case the factual pattern is identical to the facts in the *Thompson* case, above. At year's end the Appellees had wheat but no money. The repayment of the loan before years' end closed an otherwise taxable transaction.

CONCLUSION

The Judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATION

In connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Dated March 22, 1968.

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IN THE

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FOR THE NINTH CIRCUIT

KARL HINES NARTEN,

Appellant,

vs.

FRANK A. EYMAN, Superintendent
ARIZONA STATE PENITENTIARY,

Appellee.

APPELLEE'S ANSWERING BRIEF

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Appellee.

JURISDICTIONAL STATEMENT

Appellee accepts appellant's jurisdictional statement.

STATEMENT OF FACTS

The statement of facts set out by appellant in his brief is essentially accurate and is accepted for purposes of this appeal. Appellee would, in addition, specifically incorporate herein by reference the facts as found by the District Court and by the Arizona Supreme Court in their

opinions. To avoid unnecessary duplication, specific evidentiary facts will be set out in the argument portion of the brief as required.

CONSTITUTIONAL PROVISIONS INVOLVED AND QUESTIONS PRESENTED

Appellee accepts appellant's presentation of these matters in his brief.

ARGUMENT

I

APPELLANT RECEIVED A FAIR TRIAL BY A COMPLETELY IMPARTIAL JURY, ADEQUATELY PROTECTED BY THE JUDGE FROM OUTSIDE INFLUENCE, AND FREE FROM ANY PREJUDICIAL TAINT AS A RESULT OF PRETRIAL PUBLICITY.

Murder, sex, mystery and an old-fashioned western chase and capture in old Mexico made this case very newsworthy, in much the same way "murder and mystery, society, sex and suspense" focused the news media upon Dr. Samuel Sheppard, Sheppard v. Maxwell, 384 U.S. 333, 356, 16 L.Ed. 2d 600, 616, 86 S.Ct. 1507. There the analogy ends.

No one can read any version of the facts, either from the opinion of the Arizona Supreme Court, State v. Narten, 99 Ariz. 116, 407 P.2d 81, the order of the district court

herein, or as set out in appellant's brief, and come to any other conclusion but that we are not here concerned with the Sheppard decision reincarnated, or anything close to it.

The vast bulk of the lurid publicity in the case occurred at the time of the killing, the subsequent chase and capture in Mexico, and the return of appellant to Tucson for preliminary hearing. After the preliminary hearing the publicity dropped off almost completely until trial, when it again increased.

Each juror was carefully questioned on voir dire. There was no disclosure of any "pattern of deep and bitter prejudice", Irvin v. Dowd, 366 U.S. 717, 6 L.Ed.2d 751, 81 S.Ct. 1639. Indeed, only forty-nine jurors were required to be questioned to obtain the necessary thirty-two prospective jurors prior to the exercise of ten peremptory challenges allowed each side, Rule 225 (1), Arizona Rules of Criminal Procedure, 17 A.R.S. (In Irvin v. Dowd, supra, 430 persons were voir dired in 2,783 pages of transcript to arrive at a jury). It is questionable whether the number of jurors questioned in this case

prior to the empanelment of the trial jury is even average for a cause wherein either the death penalty or life imprisonment can be imposed.

As was stated by the United States Supreme Court in Irvin v. Dowd, supra:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread, and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." Irvin v. Dowd, supra, 366 U.S. at 722.

Nothing in the later decisions in Estes v. Texas, 381 U.S. 532, 14 L.Ed.2d 543, 85 S.Ct. 1628; Sheppard v. Maxwell, supra, has lessened the import of this language as it be applied to the case at bar.

It has always been the law that the trial court judge has a wide degree of discretion in determining the impar-

tiality of a juror and in weighing the reasons for granting a continuance or change of venue. Hilliard v. State of Arizona, 362 F.2d 908 (9th Circ. 1966); State v. LeVar, 98 Ariz. 217, 403 P.2d 532; Ungar v. Sarafite, 376 U.S. 575, 11 L.Ed.2d 921, 84 S.Ct. 841.

In a sense, especially in pressing the importance of the testimony of Dr. Tharp, appellant does not really argue that any juror was improperly seated under the law, either as expressed by the Arizona Supreme Court, or by the United States Supreme Court, but simply that in a case such as this, an accused, in all probability cannot get an absolutely impartial jury to try him and therefore the whole procedure is unfair.

The Tenth Circuit characterized the problem well in Welch v. United States, 371 F.2d 287 (10th Circ. 1966), a case involving the prosecution of a prominent jurist for income tax evasion:

> "Fairness in the administration of justice is not a one-way street to be approached only through an entrance limited to the accused. His cause cannot be submitted to automated jurors existing in complete sterility." 371 F.2d at 291

Quite clearly the procedures adopted by the judge to

insure the fairness of this trial and the impartiality of this jury were reasonably directed toward and effective for the accomplishment of that purpose. Hilliard v. State of Arizona, supra. There is no way that the action or inaction of the trial court in this case can, under any legitimate view of the facts, be magnified into a denial of appellant's Federal Constitutional guarantees of a fair trial by an impartial jury of his peers.

II

NOTHING IN THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRES THE STATE TO PROSECUTE APPELLANT ONLY BY GRAND JURY INDICTMENT.

Appellant claims that there is a trend in the direction of holding that rights guaranteed by the first ten amendments are secured to the citizen from violation by the states by virtue of the Fourteenth Amendment; and that this Court should find, in anticipation of such finding by the United States Supreme Court, that prosecution by preliminary hearing is a violation of due process.

Article 2, § 30 of the Constitution of the State of Arizona provides as follows:

> "No person shall be prosecuted criminally in any court of record for felony or misdemeanor,

> otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."

This constitutional provision is implemented by Rule 78, Rules of Criminal Procedure, 17 A.R.S. 192, which provides as follows:

> "A. Every felony and every misdemeanor of which the superior court has original jurisdiction shall be prosecuted by indictment or information, and every misdemeanor may be prosecuted by indictment or information." (Emphasis supplied)

The United States Supreme Court in holding that prosecution by information is constitutional the Court used this language in Hurtado v. California, 110 U.S. 516, 28 L.Ed. 232, 4 S.Ct. 111:

> "Tried by these principles we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

Maxwell v. Dow, 176 U.S. 581, 44 L.Ed. 597, 20 S.Ct. 448, used this language:

> "The objection that the proceeding by information does not amount to due process of law has been

heretofore overruled, and must be regarded as settled by the case of Hurtado v. California, 110 U.S. 516. The case has since been frequently approved. Hallinger v. Davis, 146 U.S. 314, 322; McNulty v. California, 149 U.S. 645; Hodgson v. Vermont, 168 U.S. 262, 272; Holden v. Hardy, 169 U.S. 366, 384; Brown v. New Jersey, 175 U.S. 172, 176."

The Missouri case of State v. Waller, 382 S.W.2d 668, involved a murder prosecution by information which was affirmed. The Court said:

"Finally, appellant's claim that he could have been charged with a capital offense only by an indictment, and not by an information is obviously without merit. . .The requirement of the Fifth Amendment to the Constitution of the United States has no application to state procedure in this regard. Hurtado v. California, 110 U.S. 561, 534, 4 S.Ct. 111, 28 L.Ed. 232; State v. Cooper, Mo. Sup. 344 S.W.2d 72 (1-3)."

See also, Horner v. State, 168 So.2d 137 (Fla.)

There is a strong trend in the decisions of the Supreme Court toward preserving to the citizen substantial rights from which he may benefit. It is not a trend toward the preservation of ancient forms, where newer forms have bestowed substantial benefit upon the citizen charged with crime.

Rule 16, Rules of Criminal Procedure, 17 A.R.S. 9.4, provides that a defendant brought before a magistrate after

arrest on a felony charge, has a right to an immediate preliminary examination in order to determine whether or not there is probable cause to believe the defendant is guilty of any offense.

The defendant has a right to have counsel present at such examination. (Rules 16, 18, 19) He has the right to have witnesses summoned, to have their testimony heard, and to have them sequestered. (Rules 22, 26, 27) All witnesses shall be examined in the presence of the defendant and may be cross-examined. (Rule 23) The defendant may make a statement concerning the charges against him, and may answer the charge and explain the facts appearing against him. (Rule 24) He may order a transcript of the entire proceedings. (Rule 28)

If the Rules of Criminal Procedure are not followed, or if the evidence is not sufficient to support a finding of probable cause, relief is available by habeas corpus and motion to quash. State ex rel Corbin v. Superior Court, In and For the County of Maricopa, 100 Ariz. 236, 413 P.2d 264, opinion modified on rehearing 100 Ariz. 362, 414 P.2d 738. Defense counsel usually ask for and obtain

a preliminary hearing for the purpose of learning the nature of the prosecutor's case. State v. Essman, 98 Ariz. 228, 403 P.2d 540, at 542.

Grand jury proceedings are secret. The defendant has no right to be present; his counsel may not be present; defendant may not have witnesses present, nor cross-examine the witnesses against him. There is even no absolute right to a transcript of the proceedings. The preliminary hearing, rather than violating the standard of due process, has raised a new standard of fairness to the accused and has placed new burdens on the prosecution and new protection around the rights of the accused.

III

IT IS NOT AN UNREASONABLE CLASSIFICATION TO ALLOW A JURY OF LAYMEN TO ASSESS PUNISHMENT UPON DIFFERENT EVIDENCE THAN WOULD BE AVAILABLE TO A JUDGE, WERE THE QUESTION PUT TO HIM.

It is unquestionably the law in Arizona that no evidence in mitigation can go into evidence in a first degree murder case tried to a jury, unless it has some relevancy toward proving the accused's guilt or innocence, including the proper grading of the offense. State v. Narten,

99 Ariz. 116, 407 P.2d 81; Campbell v. Territory, 14 Ariz. 109, 125 Pac. 717. It is equally true that evidence concerning aggravation cannot be introduced before a jury against a defendant, unless it too has some relevance toward proving guilt or innocence, or grading the offense. Turley v. State, 48 Ariz. 61, 59 P.2d 312.

On the other hand, if the accused pleads guilty, the trial judge may take into consideration many things, both favorable and unfavorable to the defendant which the jury may not, in determining which of the two punishments to assess. State v. Jones, 95 Ariz. 4, 385 P.2d 1019, rendered void on habeas corpus proceedings in other grounds. Jones v. Eyman, (No. 20,054, 9th Cir., Nov. 24, 1965) ___ F.2d ___; Rules 336 and 187, Rules of Criminal Procedure, 17 A.R.S.

While it must be very evident that many items of information about the defendant may come in during the disclosure of the crime itself and the circumstances surrounding it (e.g., State v. Coey, 82 Ariz. 133, 309 P.2d 260; DeWoody v. State, 21 Ariz. 613, 193 Pac. 299; Sullivan v. State, 47 Ariz. 224, 55 P.2d 312; Short v.

State, 53 Ariz. 185, 87 P.2d 266; State v. Robinson, 89 Ariz. 224, 360 P.2d 474), it is true that the jury must base its determination as to punishment solely upon the facts legitimately admissible to prove the crime itself and the circumstances surrounding it. Is this an unreasonable classification within the meaning of the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution? Obviously it is not.

Appellant's argument on the question presented may be somewhat persuasive of the proposition that the law ought to be amended so that evidence in mitigation of punishment might be presented to a jury. His argument, however, falls far short of establishing that Arizona's procedure denies him equal protection or due process.

Appellant questions the propriety of a trial in which a jury passes on the question of guilt and the question of penalty based on the same evidence. In Pope v. United States, 372 F.2d 710 (8th Circ. 1967) the court stated:

> "Our conclusion is fortified by the supreme court's very recent remarks in Spencer v. State of Texas, 385 U.S. ___, 87 S.Ct. 648, 17 L.Ed. 2d ___ (1967) about two-stage jury trial

> procedure. There, Mr. Justice Harlan, author of the principal opinion, said, 'Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.' " 372 F.2d at 370.

(Spencer v. Texas is found at 385 U.S. 554, 17 L.Ed.2d 606, 87 S.Ct. 648.)

The legislature of Arizona has determined that the choice of penalty in first degree murder shall be on the basis of an attempt to make the punishment fit the crime, rather than the criminal. It has decreed that the determination is to be based on the facts admissible to prove the crime itself and the circumstances surrounding it, rather than the facts of the defendant's history and personality. Nothing in either state or federal constitutions prohibits such a classification, however much some present day penologists may question the wisdom of such a proceeding.

IV

UNDER ARIZONA AND FEDERAL LAW, PETITIONER WAS NOT PRECLUDED FROM PUTTING ON PROPER DEFENSIVE EVIDENCE.

In spite of its direction and phraseology, petitioner's argument is directed against the M'Naghten Rule

for the determination of criminal responsibility, which is the law in Arizona, State v. Narten, supra; State v. Schantz, 98 Ariz. 200, 403 P.2d 521.

It is submitted that the series of California cases cited, and particularly People v. Gorshen, 51 Cal.2d 716, 336 P.2d 492, is a not-too-heavily veiled attempt by the California Court to force the legislature to adopt a different test for criminal responsibility.

A careful reading of Schantz, supra, together with Dr. Beaton's proferred testimony (Transcript of Record, Volume 1, Exhibit E) will clearly indicate the soundness of the Arizona court's reasoning why this offered evidence was not competent under M'Naghten and why M'Naghten is still the best test available. One answer of Dr. Beaton is particularly enlightening:

> "A. The opinion again is two-fold. I am not sure intellectually he did not appreciate his acts, but I think because of his personality controls, he lacked the capacity to conform his behavior to the commands of the law." (Transcript of Record, Volume 1, Exhibit E, supra; Trial Transcript, pp. 1385-1386.)

Clearly, Dr. Beaton's testimony, on the whole, supports a conclusion that any deficiency in petitioner's

mental processes went to his volitional processes and not his perceptive and cognitive processes, and thus, evidence of this lack of volitional control would be inadmissible under a proper interpretation of M'Naghten, State v. Schantz, supra.

The United States Supreme Court has held the M'Naghten test to be constitutionally sound. Leland v. Oregon, 343 U.S. 790, 96 L.Ed. 1302, 72 S.Ct. 1002. There is no valid or subsisting reason to change that position at this time. Mr. Narten knew full well what he was doing at the time of the shooting.

In weighing these conflicting values and compelling interests of both society and the individual, it is to be hoped that the interests of all the Rickel Hansons of this land, past, present, and future, whose constitutional rights are rather abruptly terminated without due process or possible appeal, would receive extensive and careful consideration.

V

PETITIONER'S STATEMENT WAS PROPERLY RECEIVED INTO EVIDENCE, NOT BEING VIOLATIVE OF ANY GUARANTEE OF THE FEDERAL CONSTITUTION.

Clearly this statement does not fall within the

scope of Miranda v. Arizona, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602; Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed.2d 977, 84 S.Ct. 1758; or Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199, There was no compulsion, no interrogation, no state action whatsoever. The conference was arranged solely for the convenience of appellant's wife, who worked late hours.

Any privilege related to the fact of marriage was waived when the participants held the conversation knowing a third party to be present. (Trial Transcript, hereinafter referred to as T.T., pp. 971-977). De Leon v. Territory, 9 Ariz. 161, 80 Pac. 348. There is no evidence of surreptitious eavesdropping; the officer was merely insuring the continued custody of this man charged with a capital offense. The petitioner was talking to his wife. At times they would both ask questions of the officer (T.T., p. 972). He was in no way questioning the petitioner. He was only present for security reasons (T.T., p. 977).

It must also be stated that the substance of this conversation was not brought out in the direct examination

of this witness by the State. It was only after the facts of the conversation were alluded to in cross-examination that this statement was forthcoming on redirect examination (T.T. 959-961). The petitioner cannot complain of this evidence interjected into the proceedings at his insistence, where it is clear the State made no effort to obtain the statement, and did not attempt to introduce it as prima facie proof.

CONCLUSION

Appellant received a full and fair trial by an impartial jury of his peers. Every right guaranteed to him by both State and Federal Constitutions was judiciously protected at every stage of the proceedings. The order of the United States District Court denying appellant's petition for writ of habeas corpus should be affirmed.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General

GARY K. NELSON
Assistant Attorney General

Attorneys for Appellee

STATE OF ARIZONA)
) ss.
County of Maricopa)

GARY K. NELSON, being first duly sworn upon oath, deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

s/ Gary K. Nelson
GARY K. NELSON

SUBSCRIBED AND SWORN to before me this 11th day of December, 1967.

s/ Maria E. Doyle
Notary Public

My Commission Expires:

12-4-70

Copy mailed this 11th day of December, 1967, to:

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By s/ Gary K. Nelson
GARY K. NELSON

22251

No. [redacted]

United States
Court of Appeals
for the Ninth Circuit

ELLIS ERNEST MARSH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

FILED
MAR 4 1968
WM. B. LUCK, CLERK

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No. 21272

United States
Court of Appeals
for the Ninth Circuit

ELLIS ERNEST MARSH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE

COUNTER-STATEMENT OF FACTS

Defendant Ellis Ernest Marsh obtained a book of checks of the First Independent Bank, Battleground, Washington, and gave it to his friend Cynthia Marie Dunn, who cashed a number of the checks in Portland, Oregon, on the nights of October 11 and October 12, 1966. Miss Dunn without permission or authority used the name and identification of a Mary Jean Hitchman in cashing the checks. No account existed for a Mary Jean Hitchman at the First Inde-

pendent Bank, Battleground, Washington. Defendant was present either in the store or waiting in an automobile when Miss Dunn cashed the checks.

At trial on May 24, 1967, in the United States District Court for the District of Oregon before the Honorable Robert C. Belloni and a jury, defendant was convicted on two counts of an indictment charging him with violating 18 United States Code, Section 2314, in that he did unlawfully, knowingly, wilfully and feloniously and with fraudulent intent transport and cause to be transported in interstate commerce from Portland, Oregon to Battleground, Washington, two falsely made, forged and counterfeited securities, namely, check No. 12, in the amount of $78.00, dated October 12, 1966, and check No. 13, in the amount of $57.00, dated October 11, 1966, both payable to and cashed at Fred Meyer, Inc. at Portland, Oregon, and signed Mary Jean Hitchman, drawn against the First Independent Bank, Battleground, Washington, knowing the same to be falsely made, forged and counterfeited.

ARGUMENT

Appellant's first assignment of error is that the trial judge erred when he commented to the jury during defendant's trial counsel's cross-examination of Anthony Criscola who was an accomplice of de-

fendant Marsh and was testifying to the facts of the crime as a witness on behalf of the Government. After a series of questions by defendant's trial counsel suggesting that Criscola would receive a lighter sentence for giving his testimony, the trial judge commented as follows:

> "I think we should clear up one matter. Certainly, nothing this man says at this trial is going to have the slightest bearing upon what sentence he may receive on any other offense; and I don't think that Mr. Niedermeyer intends to convey that impression, do you, sir?" (TR. 55)

after which the following colloquy occurred:

> "MR. NIEDERMEYER: No, Your Honor, I do not. It is only the defendant's subjective belief that I am trying to convey to the Jury; that if the defendant believes this, that it would go to the weight of his testimony.
>
> "THE COURT: All Right. I just want the Jury to understand that.
>
> "MR. NIEDERMEYER: I am not alleging that he has made any arrangement with the prosecutor or anything else, but what he believes is proper cross-examination as to the trustworthiness of his present testimony.
>
> "THE COURT: All right." (TR.55)

Defendant's trial counsel made no objection to this statement by the Court and, in fact, placed upon the record his agreement with it (TR. 55).

It was a fair comment upon the testimony by the Court and does not constitute prejudicial error inasmuch as agreement to it was joined by defendant's trial counsel.

Appellant's second assignment of error is that the Court erred in its instructions to the jury on the credibility of witnesses. As to witnesses, the Court instructed as follows:

> "An accomplice is one who voluntarily participates in the commission and planning of a crime. The testimony of an accomplice should be received with caution and scrutinized with care. You should give it such weight as in your judgment it is fairly entitled to receive. You may convict a person accused of a crime upon the uncorroborated testimony of an accomplice only if you believe that the testimony of the accomplice proves the guilt of a defendant beyond a reasonable doubt.
>
> "If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection of the evidence, it is your recollection which should control during your deliberations. If you believe that any witness has willfully testified falsely with respect to any material fact about which the witness could not reasonably be mistaken, then you may, if you deem it fit to do so, disregard all or any part of the testimony of that witness, or you may accept such portion of his testimony as you find worthy of belief." (TR. 139, 140)

* * *

"If a witness who could have given material testimony to an issue in this case was peculiarly available to one party, but was not called by that party, and his absence has not been sufficiently accounted for or explained, then you may, if you deem it appropriate, infer that the testimony of the witness would have been unfavorable to the party which failed to call him." (TR. 140, 141)

"*Every witness is presumed to speak the truth.* [Emphasis added.] This presumption, however, may be overcome by the manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives, or contradictory evidence.

"You are the exclusive judges of the facts in the case and of the credibility of all of the witnesses. The power of judging the effect or value of the evidence, however, is not arbitrary but must always be exercised with legal discretion and in subordination of the rules of evidence. You are not bound to find a verdict in conformity with the testimony of any number of witnesses which does not produce conviction in your minds as against the testimony of a lesser number or against a presumption or other evidence which does satisfy your minds.

"If you find that a witness has testified falsely in any one material part of his testimony, you may look with distrust upon the other evidence given by such witness; and if you find that any witness has testified willfully false, you will be at liberty to entirely

> disregard all of the evidence given by such witness unless corroborated by other evidence which you do believe." (TR. 144)

Appellant objects to the statement contained in these instructions (TR. 144, line 1), "Every witness is presumed to speak the truth." However this comment represents a correct statement of the law as decided by this Court. *Bergmann* v. *United States,* 144 F. 2d 34 (C.A. 9, 1944). The instruction as a whole was proper and adequately cautioned the jury as to the view it should take of the witnesses' testimony. The instruction was neither objected to by defendant's trial counsel nor did he take an exception to it (TR. 146).

Appellant's third and final assignment of error is that the Court erred in instructing the jury on the elements of the crime as follows:

> "***Those material allegations are: One. the instrument in question was forged or falsely made or altered or counterfeited by someone; and, two, that the defendant transported it or caused it to be transported in Interstate or Foreign Commerce; and, three, that he did so with specific intent to defraud or other unlawful purpose; and, four, that at the time the defendant transported it or caused it to be transported in Interstate Commerce, he knew it to be forged or falsely made or altered or counterfeited; and lastly,

that the crime, if any, was committed on or about the date alleged and within the District and State of Oregon" (TR. p. 136).

* * *

"***By transportation in Interstate or Foreign Commerce is meant transportation from one state, territory, or the District of Columbia to another state, territory or the District of Columbia, or to a foreign country or from a foreign country to any state, territory, or the District of Columbia. A forged or falsely made or altered security means an instrument falsely or fictitiously made, signed or altered with the intent to defraud, which would be legally defective if genuine.

It is not necessary that the security be originally forged or falsely made or altered by the defendant" (TR. p. 137).
(Appellant's Brief, pp. 4-5)

The foregoing instruction, which appellant cites as error, was in fact defendant's own requested instruction No. 15, which the Court gave verbatim. Defendant's requested instruction No. 15 read as follows:

"The essential elements of the offense of interstate transportation of forged securities, each of which the Government must prove beyond a reasonable doubt, are:

"(1) That the instrument in question was forged, or falsely made or altered, or counterfeited by someone; and

"(2) That the defendant transported it, or caused it to be transported, in interstate or foreign commerce; and

"(3) That he did so with specific intent to defraud or with other unlawful purpose; and

"(4) That at the time the defendant transported it, or caused it to be transported in interstate commerce, he knew it to be forged, or falsely made or altered, or counterfeited.

"By transportation in interstate or foreign commerce is meant transportation from one State, territory, or the District of Columbia, to another State, territory, or the District of Columbia, or to a foreign country; or from a foreign country to any State, territory, or the District of Columbia.

"A 'forged or falsely made or altered' security means an instrument falsely or fictitiously made, signed, or altered, with the intent to defraud, which would be legally effective if genuine.

"It is not necessary that the security have been originally forged, or falsely made or altered, by the defendant.

"Sheridan v. United States, 329 U.S. 379"

In addition to giving defendant's requested instruction No. 15, which appellant now cites as error, the Court read the indictment to the jury and also read Title 18, Section 2314 (TR. 134, 135).

Defendant's counsel did not object or except to the giving of the foregoing instruction (TR. 146). Defendant made no motion at the close of the evidence or otherwise to limit the indictment or for jugment of acquittal on the issue of whether the checks may have been "counterfeit." It is clear from the Court's given instruction that the jury was instructed that it must be convinced beyond a reasonable doubt of the truth of every material allegation, including "that the instrument in question was forged *or* falsely made *or* altered *or* counterfeited by someone!" (TR. 136) [Emphasis added.]

CONCLUSION

There is no error. Appellee respectfully prays that the judgment of conviction be confirmed.

SIDNEY I. LEZAK
United States Attorney
District of Oregon

RICHARD. C. HELGESON
Assistant United States Attorney

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated this 29th day of February, 1968.

RICHARD C. HELGESON
Assistant United States Attorney

NO. 22252

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. MEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

FILED

AUG 2 1968

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 22252

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN C. MEYER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

John C. Meyer and codefendants Virgil D. Kvasnicka and Eugene M. Murphy were indicted on January 12, 1966, for violations of Title 18, United States Code, Section 1243 (fraud by wire); Title 15, United States Code, Section 77c(a) (1), (2) (sale and delivery of unregistered securities by mail); and Title 15, United States Code, Section 77e(c) (offer to sell unregistered securities by mail). Judgment of Conviction against Meyer was entered on May 9, 1966 [R. T. 2456]. 1/ Judgment After Study was entered

1/ "R. T." refers to Reporter's Transcript.

on August 23, 1966 [R. T. 2481]. Meyer's Notice of Appeal was filed on August 23, 1966.

Jurisdiction of the District Court was predicated upon Title 18, United States Code, Section 3231. This Court has jurisdiction under Sections 1291 and 1294 of Title 28, United States Code.

II

STATEMENT OF THE CASE

The sixteen count indictment, filed January 12, 1966, charged Meyer and two codefendants with six counts (Counts One through Six) of devising a scheme to fraudulently obtain money by wire from certain purchasers of fractional interests in certain Oklahome oil and gas leases; five counts (Counts Seven through Eleven) of delivering by mail unregistered securities, namely, fractional undivided interests in certain oil and gas leases, for the purpose of sale and for delivery after sale; three counts (Counts Twelve through Fourteen) of using the mails to sell unregistered securities, namely, undivided interests in oil and gas leases; one count (Count Fifteen) of using the mails to offer to sell an unregistered security, namely, fractional undivided interests in oil and gas leases; and one count (Count Sixteen) of mailing an unregistered security for sale and for delivery after sale.

Meyer was arraigned and entered a plea of not guilty to

all counts on January 31, 1966. Trial by jury commenced on February 14, 1966 before the Honorable E. Avery Crary, United States District Judge [R. T. 4]. A verdict of guilty on Counts One through Fifteen was returned on April 18, 1966 [R. T. 2428]. Judgment of Conviction against Meyer was entered on May 9, 1966 [R. T. 2456]. On August 23, 1966, Judgment After Study was entered [R. T. 2481], and on that date, appellant filed a Notice of Appeal.

Title 18, United States Code, Section 1343 provides in part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in inter-state or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, . . . [shall be guilty of an offense].

The Securities Act of 1933 found in Title 15, United States Code, Section 77q(a) provides in part:

> (a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or

communication in interstate commerce or by the use of the mails, directly or indirectly --

(1) To employ any device, scheme, or artifice to defraud, or

(2) To obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) To engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

It is further provided in the Securities Act that for the purpose of the statute the term "security" means:

> Any note, stock, . . . bond, debeture, . . . fractional undivided interest in oil, gas or other mineral rights, or in general, any interest or instrument commonly known as 'security'.

III

QUESTIONS PRESENTED

1. Did the trial court commit plain error when it failed to declare a mistrial and sever Meyer's trial from that of his codefendants during the course of trial?

2. Was it a violation of Meyer's constitutional rights to continue the trial in his absence?

3. Were Meyer's rights to a fair trial and to confront witnesses violated by the argument of the prosecution?

IV

STATEMENT OF FACTS

Late in 1962, defendant John C. Meyer met with codefendants Eugene Murphy and Virgil Kvasnicka and suggested a plan to the codefendants for selling fractional interests in oil wells to be drilled by Meyer on his leases [R. T. 1633, 1657]. Meyer told both men that, among other things, he had a Ph. D. in geology from the Colorado School of Mines; he was wealthy; he had been successful in drilling for oil in the past; he was a former Marine officer; he owned producing oil wells all over the world; he owned oil leases in Oklahoma which were on Osage Indian land and were not therefore subject to production controls; that the leases were subdivided into working interests, which could be sold in small units at prices from $250 to $1,000 each, and that

each well would require $32,000 for drilling [R. T. 1628-9, 1650-2, 1670-3, 2074-100].

Kvasnicka and Murphy agreed to sell these interests in $250 to $1,000 units in return for a 10% commission on each sale and an overriding royalty in certain of the oil leases [R. T. 1633, 2074-6].

Kvasnick and Murphy immediately commenced sales activities, primarily in Idaho, Utah, and California [R. T. 1658, 2074-76, 2095]. In the process, both men repeated the statements made to them by Meyer about Meyer's background and expertise in the oil producing business [R. T. 1670-73, 2074-2090].

To aid Murphy and Kvasnicka in the selling, Meyer provided the information and caused to be prepared a brochure (Government's Exhibit 1A) [R. T. 2189], which contained numerous false statements and misrepresentations.

The false statements in the brochure included:

(a) That there was a high probability of a high-producing well in the Tulsa-Osage Counties area [R. T. 1486];

(b) That the bottom-hole pressure in the area was 1650 pounds per square foot [R. T. 1486];

(c) That maintenance costs were negligible [R. T. 1487, 1490-1];

(d) That oil migrates and replenishes itself in good oil fields [R. T. 1491-2];

(e) That wells in the area produced 20 - 30 barrels per hour [R. T. 1492-4];

(f) That Meyer's well in Illinois produced 5,000 barrels per day [R. T. 1495].

Kvasnicka and Murphy either provided a copy of the brochure or related the misrepresentations contained in it to investors. In addition, Meyer met with many of the purchasers of the oil interests. At these meetings, Meyer assisted the direct selling by making the same misrepresentations he had made to Kvasnicka and Murphy and in the brochure. 2/

In addition to the false statements in the brochure, investors were told by Meyer and his codefendants other facts which were false in the following particulars:

(a) Defendants had no contract to sell oil to Standard Oil of Ohio [R. T. 844-5; 1432-3];

(b) None of the land described in receipts given to investors was conveyed to codefendants Murphy and Kvasnicka by Meyer [R. T. 789-98];

(c) Much of the property described in the receipts given to investors was never leased or owned by any of the defendants

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2/ Meyer met with the following victims and either made the misrepresentations himself or was present when another person made them: Louise Counsemano [R. T. 136, 145-8, 168]; Fred Moore [R. T. 191, 193-202, 211, 219-21, 233]; Mervin Christensen [R. T. 356-7]; Harold Harten [R. T. 400, 406-10]; Thomas Robertson [R. T. 462-5, 468-9, 478-80]; Ed Basteda [515-6]; Billy Shekell [R. T. 562-3]; Della Bettendorf [R. T. 594, 597-8, 616]; Anna King [R. T. 632-46]; Donald McAtu [R. T. 769-70]; Richard Jennings [R. T. 819-21, 835]; Phillip Britton [R. T. 1003-6, 1010-11]; Norma Mooter [R. T. 1078, 1082]; Beverly Leos [R. T. 1118, 1125]; Marjorie Stavenhagen [R. T. 1500, 1510, 1514].

[R. T. 1258-73, 1290-92];

(d) There were only three producing oil wells on the ranch upon which Meyer drilled a well [R. T. 1420] and these wells produced but 5 barrels of oil per day [R. T. 1287-8];

(e) The legal descriptions on the receipts given to investors were entirely inaccurate [R. T. 1304-7, 1311-12];

(f) No oil was ever produced by any wells owned by Meyer in Tulsa and Osage Counties [R. T. 1366-70];

(g) Meyer did not hold a Ph. D. in geology from the Colorado School of Mines [R. T. 1578, 1581, 1606-7];

(h) Meyer was never an officer in the United States Marine Corps [R. T. 1599];

(i) Meyer's income was not so large that for tax purposes he could afford to give away income from oil wells [R. T. 1581, 1597, 1606-7];

(j) Meyer did not record, nor did he intend to record, any assignments of "working interests" with the Tulsa County or Osage County recorders [R. T. 2000-1];

(k) The wells on the Indian land were subject to production controls [R. T. 1286-7].

All of the money from sales of working interests collected by codefendants and others was turned over to Meyer [R. T. 1051, 1176, 1244, 1644, 2040, 2133]. The "working interests" were sold in $250 to $1,000 units; the total amount collected was approximately $140,000 [R. T. 1923, 2167, 1176]. Another $20,000 was collected by Murphy and Kvasnicka from sales of

"overriding royalty interests" [R. T. 1923, 2167]. No purchaser received a return on his money. Meyer did, however, drill one well on a lease owned by him at a cost of $17,000 [R. T. 1346] (not $32,000 as represented). The well never produced oil [R. T. 1365-6]. Also, Meyer refunded money to two or three investors after they had complained to him [R. T. 240, 2164].

At no time were there any registration statements filed with the Securities Exchange Commission by any of the defendants [R. T. 1608-9].

On February 24, 1966, the fourth day of trial, Meyer absented himself from the trial [R. T. 861]. After a brief hearing, the trial continued in Meyer's absence [R. T. 860-938]. The following Monday, another hearing was held in which Meyer's wife and mother, who had previously testified falsely, testified that Meyer fled because he was afraid of getting killed and that he was irrational [R. T. 950-66]. Proof was offered that Meyer was on a helicopter flight from San Bernardino to the Los Angeles International Airport on the morning of February 24, 1968 [R. T. 967]. Meyer's motion for a mistrial was denied [R. T. 974-5, 982, 1618-19].

V

ARGUMENT

A. THE TRIAL COURT DID NOT COMMIT PLAIN ERROR IN FAILING TO SEVER MEYER'S TRIAL.

Meyer concedes that he was properly joined as a defendant under Rule 8, Federal Rules of Criminal Procedure [A. B. 17]. 3/

At the commencement of trial, Meyer moved for severance under Rule 14 of the Federal Rules of Criminal Procedure 4/ on the ground that the codefendants Murphy and Kvasnicka had made statements to the government which would prejudice Meyer [R. T. 24]. The motion was denied [R. T. 48]. The government represented that the statements of neither defendant would be offered into evidence [R. T. 24]. No such statements were introduced by the government. Meyer's motion for severance was never renewed.

Both codefendants, Murphy and Kvasnicka, based their defense on the theory that they were participating innocently and

---

3/ "A. B." refers to appellant's brief.

4/ Rule 14. Relief from Prejudicial Joinder. "If it appears that a defendant or the government is prejudiced by joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or the separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance, the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

acting in good faith in reliance upon representations made by Meyer [R. T. 83, 1620-2074, 2074-2154].

The survey of the case law interpreting Rule 14 in Appellant's Brief [A. B. 18-19] and the standard of fairness applied in these cases is accurate. The applicable test under these cases is whether the joint trial is fundamentally fair; that determination turns on the facts of each particular case. United States v. Echeles, 352 F. 2d 892, 896 (7th Cir. 1965).

Also, it is settled that severance rests within the discretion of the trial court, United States v. Brown, 375 F. 2d 310 (D. C. Cir. 1966), cert. denied, 388 U. S. 915 (1957). Absent a showing of a clear abuse of discretion by the trial court, this Court should not disturb the conviction. Opper v. United States, 348 U. S. 84 (1954).

Meyer argues that severe prejudice to him resulted from the trial court's failure to sever his case, and in that connection, asserts three factors.

First, Meyer claims that his codefendants actively prosecuted him in order to persuade the jury that they, too, were victims of appellant's fraudulent scheme [A. B. 20-1].

He relies upon United States v. Valdes, 262 F. Supp. 474 (D. C. P. R. 1967). In Valdes, the District Court granted a pretrial motion for severance on the ground that prejudice would result from one defendant's attempt to blame his codefendant for the commission of the crime. Here, however, Meyer did not urge this as a ground in his motion for severance before trial, or at

any time in the court below. Moreover, research discloses no case in which a failure to sever for this reason was plain error.

On the contrary, the overwhelming weight of authority is expressed by United States v. Cohen, 124 F. 2d 164, 166 (2nd Cir. 1941):

> It is common in cases of joint indictments that there is hostility of some of the defendants to the others and that they will try to save themselves by placing the blame on their associates in the crime. The jury can, and does, weigh the inductment of some defendants to implicate others in determining guilt. We find no error in the disposition of the motion to compel severance and hold that the order denying it should be affirmed.

Accord, Baker v. United States, 329 F. 2d 786 (10th Cir. 1964), cert. denied, 379 U. S. 853 (1964); Sharp v. United States, 195 F. 2d 997 (6th Cir. 1952); Dauer v. United States, 189 F. 2d 343, 344 (10th Cir. 1951), cert. denied, 342 U. S. 898 (1951); Allen v. United States, 91 U. S. App. D. C. 197, 202 F. 2d 329 (D. C. Cir. 1952), cert. denied, 344 U. S. 869 (1952); United States v. Bentvena, 193 F. Supp. 485 (D. C. N. Y. 1960), aff'd., 357 F. 2d 58 (1966), cert. denied, 385 U. S. 815 (1966); United States v. Steffes, 228 F. Supp. 491 (D. C. Mont. 1964).

The policy for rarely granting a severance was summarized in Davenport v. United States, 260 F. 2d 591 (9th Cir. 1958), cert. denied 359 U. S. 909 (1959):

'Where two or more defendants are indicted for a joint transaction, it is inadvisable to split up the case into many parts for separate trials, in the absence of very strong and cogent reason therefor.'

* * *

'A man takes some risk in choosing his associates and, if he is hailed into court with them, must ordinarily rely on the fairness and ability of the jury to separate the sheep from the goats.'

A strong showing of prejudice by the movant is required because, as stated in United States v. Wallace, 272 F. Supp. 838, 841 (D. C. N. Y. 1967):

[A] defendant's desire for a separate trial must yield to the public interest in avoiding unnecessary duplication and expense and in utilizing available facilities and personnel to best advantage toward assuring speedy trials for all of those accused . . . and the burden is upon the movant to come forward with facts demonstrating that he will be so severely prejudiced by a joint trial that it would in effect deny him a fair trial altogether.

Secondly, Meyer claims that he was prejudiced because the codefendants testified but Meyer did not, and because this fact was adverted to by defense counsel [A. B. 24].

Meyer relies upon De Luna v. United States, 308 F. 2d 140 (5th Cir. 1962), reh. denied, 324 F. 2d 375 (1963), in which comments on a defendant's failure to testify by a codefendant's attorney constituted error. In that case, however, counsel for the codefendant referred directly to De Luna's failure to testify and argued that an honest man is not afraid to take the stand and testify. 5/ No such statements were made in Meyer's trial, and no reference was made to Meyer's silence. Counsel merely said, "He [referring not to Meyer but to the codefendant] brought those receipts in here to you" [R. T. 2297] and "the two defendants here have admitted they sold these interests. They have admitted they made these representations" [R. T. 2337].

These remarks do not refer to Meyer's failure to take the stand, much less constitute "inflammatory and prejudicial" comment. It should be noted that in De Luna, the court emphasized that the comments "were not casual or isolated references; they were integral to Gomez's defense".

The facts here are closer to those in United States v. Parness, 331 F. 2d 703, 705 (3rd Cir. 1964), cert. denied 377 U. S. 993 (1964). Parness, in distinguishing De Luna, limited the latter to the particular facts and procedures followed at that trial, and added:

5/ "Well, at least one man was honest enough and had courage enough to take the stand and subject himself to cross-examination and tell you the whole story. . . . You haven't heard a word from this man [De Luna]." 308 F. 2d at 142.

> Under all the circumstances of this case we do not think that the statement that Parness took the witness stand because he had nothing to hide as phrased by his attorney, was outside the limits permitted an advocate in his defense summation. It did not refer to the failure of Grimmett to testify directly or by inference. We cannot fairly hold that it was in violation of appellant's constitutional rights. 6/

Thirdly, Meyer implies that the statements given by Kvasnicka and Murphy to the government prior to trial were prejudicial, even though these statements were not used in the trial [A. B. 18].

This same situation arose in Dauer v. United States, supra. Dauer and another were jointly indicted. Dauer's codefendant had made a written confession in which he tried to vindicate himself at the expense of Dauer. The government announced that it did not intend to use and did not introduce the codefendant's confession. The trial court's denial of the motion to sever was affirmed.

6/ In Parness one defendant testified, and one did not. There was no objection to the charge given below, and no motion for a new trial involving the severance issue. The issue was raised for the first time on appeal. The court went on to state that "the Grimmett defense cannot be excused for not having asked for a mistrial".

B. PROCEEDING WITH THE TRIAL IN MEYER'S ABSENCE WAS PROPER.

Rule 43 of the Federal Rules of Criminal Procedure provides in part that:

> In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.

The purpose of this provision "is to prevent frustration of a trial in progress by the escape or absconding of the defendant". Cross v. United States, 325 F. 2d 629, 631 (D. C. Cir. 1963).

Rule 43 is applicable where, as here, the defendant is on bond. Meyer had a duty to appear at the times appointed by the court, or if he was unable to do so, to communicate with the court or counsel concerning his absence. Meyer did neither. See Diaz v. United States, 223 U. S. 442 (1911).

Meyer's reliance on Johnson v. Zerbst, 304 U. S. 458 (1938) is misplaced. That case involved an invalid waiver of the right to counsel. The requirement that such a waiver must be voluntary and intelligent was emphasized. It does not assert that Rule 43 requires an express waiver of defendant's presence at trial, after trial has begun and the defendant has absconded.

Rule 43 requires a finding that defendant's absence was voluntary. It does not require an express waiver of presence by

the defendant. If he voluntarily leaves, defendant has impliedly waived his right to be present. State ex. rel. Shetsky v. Utecht, 228 Minn. 44, 36 N. W. 2d 126 (1949); see Phillips v. United States, 334 F. 2d 589 (9th Cir. 1964), cert. denied, 379 U. S. 1002 (1965); Cross v. United States, supra; see also, Diaz v. United States, supra.

Furthermore, Zerbst emphasizes that:

> "The determination of whether there has been an intelligent waiver of the right to counsel must depend, on each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." 304 U. S. at 464.

At Meyer's trial, the court found such an implied waiver. The trial judge rejected Meyer's vague assertions that his life had been threatened and found that Meyer's absence was voluntary. An abundance of evidence supports this finding [R. T. 860-938, 950-974]. This Court will not disturb such a factual determination by the trier of fact. Noto v. United States, 367 U. S. 290 (1961); Glasser v. United States, 315 U. S. 60 (1942).

Moore v. Michigan, 355 U. S. 155 (1957), relied upon by Meyer, is inapposite. There, a 17 year old Negro boy "waived" his right to counsel and pleaded guilty, after the Sheriff had told him that he (the Sheriff) might not be able to protect him.

Obviously, the boy's fear of attending trial affected his plea of guilty and vitiated his waiver of counsel. The "waiver" in Moore was induced by the police while the defendant was in police custody. Meyer, however, never sought protective custody of the court or of any law enforcement agency, nor did he truthfully advise his own attorney of his disappearance, or the alleged reason for it [R. T. 860-1, 950-66]. Assuming, arguendo, that Meyer was threatened, there are no facts to bring the circumstances of his action within the definition of coercion or duress. 7/ Meyer, if believed, chose not to seek protection, but to flee.

Turner v. Louisiana, 379 U. S. 466 (1965) is also distinguishable. It deals with the conduct of prosecution witnesses in influencing the jury outside the courtroom. The arresting officers, who also took a confession from the defendant, ate, conversed, and continuously associated with the jury during the three day trial. Clearly, the probability of prejudice resulting from this activity is great. No such activity was present in the instant case. Compare, Bowles v. Texas, 366 F. 2d 734 (1966).

In any event, the trial court rejected the vague testimony that Meyer acted under duress which was offered by Meyer's wife and mother; the credibility of witnesses is to be determined by the fact-finder. 8/

7/ See Phillips v. United States, 334 F. 2d 589, 591 (9th Cir. 1964) (defining coercion, compulsion and necessity).

8/ Research reveals no federal case on the question of coercion or duress under Rule 43. In Massey v. State, 31 Tex. Cr. 371, 20 S. W. 758 (1892), a defendant was moved to another

(Continued)

C. A MISSTATEMENT OF EVIDENCE BY THE PROSECUTOR WAS NOT PREJUDICIAL.

Meyer contends that the Assistant United States Attorney's reference in argument to Meyer's 1962 arrest for obtaining money by false pretenses was such a misstatement of the evidence as to be plain error. The only evidence regarding the arrest was that it involved an oil venture in Michigan [R. T. at 2182].

On direct examination, co-defendant Murphy testified that Meyer had been arrested in 1962 and that Meyer told him (Murphy) that it was a mistake, that it was Meyer's father whom the police intended to arrest [R. T. 2096-2099].

On cross-examination, the government showed Murphy a newspaper clipping to refresh his memory about the incident. Murphy silently read the article which apparently referred to the charges of obtaining money by false pretenses. The judge excluded the newspaper from evidence and carefully instructed the jury to disregard the showing of the newspaper [R. T. 2187]. Murphy stated again that Meyer told him the trouble involved Meyer's father and that an oil venture in Michigan was involved [R. T. 2188].

8/ Continued:

county for fear that his jail cell would be attacked by a mob. The judge and county attorney advised the defendant to waive his right to be present at his trial. The court held that his waiver was invalid. In Vecks v. State, 42 Ga. App. 451, 156 S. E. 729 (1931) the defendant's absence, as a result of threats made on his life, was determined to be voluntary and his conviction was affirmed.

The prosecutor mentioned in argument that Meyer was arrested for obtaining money by false pretenses [R. T. 2377, 2348]. In response to Meyer's objection, the court stated that there was no evidence with respect to obtaining money by false pretenses, but only that Meyer had been arrested in connection with an oil venture. Meyer did not move for a mistrial [R. T. 2348].

The test to be applied is whether the prosecutor's misstatement was so prejudicial that defendant was denied a fair trial. Isaacs v. United States, 301 F. 2d 706 (8th Cir. 1962), cert. denied, 371 U. S. 818 (1962); United States v. Davis, 260 F. Supp. 1009 (D. C. Tenn. 1966), aff'd., 365 F. 2d 251 (6th Cir. 1966).

In this connection some latitude is allowed counsel in argument, unless the statements are untruthful or plainly prejudicial. United States v. Mucherino, 311 F. 2d 172 (4th Cir. 1962); See United States v. Barrett, 280 F. 2d 889 (2nd Cir. 1960). Only in cases of clear abuse by a prosecutor will a conviction be set aside because of improper argument. Cf. United States v. Redfield, 197 F. Supp. 559 (D. C. Nev. 1961), aff'd., 295 F. 2d 249 (9th Cir. 1961), cert. denied, 369 U. S. 803 (1962); Brennan v. United States, 240 F. 2d 253 (8th Cir. 1957), cert. denied, 353 U. S. 931 (1957); Weiss v. United States, 122 F. 2d 675, 690 (5th Cir. 1941), cert. denied, 314 U. S. 687 (1941); D'Aquino v. United States, 192 F. 2d 338 (9th Cir. 1951), cert. denied, 343 U. S. 935 (1952). (These cases involve inflammatory remarks by the prosecution.)

Wigmore explains that:

> [S]ince misunderstandings constantly arise as to the tenor and effect of evidence, and since in the strain and fervor of argument honest errors of memory may easily occur, improper assertions may come to be made unwittingly. For such contingencies, on the one hand, judicial charity should be shown in excusing the counsel from the guilt of knowing misconduct. * * * Wigmore, Evidence §1807, p. 264 (3d. Ed. 1940).

The instant case falls within the category of cases cited above. Although the newspaper clipping was shown to Murphy in front of the jury, the court instructed the jury to disregard it [R. T. 2187]. There is no reason to presume that the jury did not follow that instruction. See Nabob Oil Co. v. United States, 190 F. 2d 478, 481 (10th Cir. 1951), cert. denied, 342 U. S. 876; Kowalchuk v. United States, 176 F. 2d 873, 877 (6th Cir. 1949).

Additionally, at the prosecutor's request [R. T. 2192], the judge instructed the jury that the testimony concerning Meyer's arrest was not evidence on the guilt or innocence of any of the defendants, but that it was admitted only for consideration on the issue of whether Murphy and Kvasnicka relied in good faith upon the representations Meyer made involving his oil ventures [R. T. 2195]. Also, the trial court corrected the slight misstatement by the prosecutor and informed the jury as to the correct state of the evidence [R. T. 2348]. Finally, the misstatement of fact was

slight compared to the amount of evidence offered in this lengthy, complicated trial, and the evidence against Meyer was overwhelming.

It is fundamental that the government must prosecute upon the highest level of fair play; however, a prosecutor's slight oversight should not frustrate the administration of justice. See Lewis v. United States, 277 F. 2d 378 (10th Cir. 1960), sub nom, Burley v. United States, 295 F. 2d 317 (10th Cir. 1961).

Parker v. Gladden, 385 U. S. 363 (1966), relied upon by Meyer is entirely distinguishable on its facts. In Parker, the bailiff of the court commented that the defendant was guilty and a wicked man. This comment was overheard by three jurors. Because of the bailiff's official status, his opinion probably weighed heavily with the jury, and there was evidence that one of the jurors was prejudiced by the bailiff's statements. The court held that these facts raised such a probability of prejudice that the defendant was denied due process of law. Obviously, the facts before this Court do not present such a probability of prejudice.

Rule 52(a) of the Federal Rules of Criminal Procedure provides: "Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The prosecutor's misstatement of the evidence in the context of this case falls squarely within Rule 52(a) and was therefore harmless.

CONCLUSION

For the reasons stated above, the conviction should be affirmed.

Respectfully submitted,

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No. 22255

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANTON STANWOOD McHENRY,

Appellant,

vs.

LAWRENCE E. WILSON, Warden, California State Prison, San Quentin,

Appellee.

FILED

NOV 1 1967

WM. B. LUCK, CLERK

APPELLEE'S BRIEF

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NOV 3 1967

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GRANTON STANWOOD McHENRY, Appellant, vs. LAWRENCE E. WILSON, Warden, California State Prison, San Quentin, Appellee.	)	No. 22255

APPELLEE'S BRIEF

JURISDICTION

The jurisdiction of the United States District Court to entertain appellant's petition for a writ of habeas corpus was invoked under Title 28, U.S.C., section 1915. The jurisdiction of this Court is conferred by Title 28, U.S.C., section 2253, which makes an order in a habeas corpus proceeding reviewable in the Court of Appeals when, as here, a certificate of probable cause has been issued.

STATEMENT OF THE CASE

Appellant appeals from the order of the United States District Court for the Northern District of California. denying his petition for writ of habeas corpus.

A. Proceedings in the state courts.

On October 18, 1960, appellant was convicted of

violating California Penal Code section 261.1 (statutory rape). He was sentenced to be imprisoned for the term prescribed by law (TR 88-89). There was no appeal.

On April 25, 1963, appellant was released on parole from state prison with regard to the above conviction for rape (TR 79).

Thereafter, on January 28, 1965, appellant was convicted of violating California Penal Code section 12021 (possession of a weapon by a felon). This judgment and conviction also reflects as a charged and proved or admitted prior felony conviction the above conviction for statutory rape in 1960. Appellant was sentenced to be imprisoned for the term prescribed by law (TR 86-87). There was no appeal.

Appellant's parole was subsequently canceled and his term on the 1960 rape conviction was refixed at the maximum (TR 79-81).

On September 15, 1965, the Monterey County Superior Court denied without opinion appellant's petition for writ of habeas corpus. The California Court of Appeal, First Appellate District, denied a similar petition on October 22, 1965. Subsequently, the California Supreme Court denied without opinion appellant's petition

for writ of habeas corpus on December 22, 1965 (TR 5).[1/]

B. Proceedings in the federal courts.

Appellant petitioned for writ of habeas corpus in the United States District Court for the Northern District of California on March 10, 1966 (TR 1). On May 26, 1966, the district court denied appellant's petition, concluding that appellant was barred by McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238 (1934). Appellant filed a motion for rehearing on June 10, 1966, which was denied on July 22, 1966 (TR 61, 64). Appellant then filed a motion for certificate of probable cause on August 4, 1966 (TR 65), and, on September 1, 1966, the district court vacated the order of dismissal and dismissed the cause with leave to amend on the grounds that appellant had set forth allegations in his motion for certificate of probable cause which, if true, might merit further consideration by the court of the petition for writ of habeas corpus, if properly amended (TR 69). Appellant filed an amended petition on September 15, 1966 (TR 70), and an order to show cause was issued on January 6, 1967 (TR 73).

A return to the order to show cause and points and authorities in opposition to the petition for writ of

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1. "TR" refers to the transcript of record on the proceedings in the district court.

habeas corpus was filed by the California Attorney General on January 30, 1967 (TR 78). Appellant filed a traverse on February 15, 1967 (TR 96). The district court ordered a supplement to the above return on February 10, 1967 (TR 94), which was complied with by the California Attorney General on February 20, 1967 (TR 100). Appellant filed a traverse to the supplemental return on March 3, 1967 (TR 112).

On May 22, 1967, the district court denied appellant's petition for writ of habeas corpus (TR 118-125). Appellant filed motions for rehearing and for appointment of counsel on May 29, 1967 (TR 126-129), which were denied on June 8, 1967 (TR 130-131). Judge Zirpoli granted appellant's application for certificate of probable cause on June 26, 1967 (TR 135), and granted permission to appeal in forma pauperis on September 6, 1967 (TR 139). Notice of Appeal waf filed on September 6, 1967 (TR 140).

APPELLANT'S CONTENTIONS

1. The district court misconstrued appellant's pleadings and thereby erred in refusing to grant an evidentiary hearing.

2. The district court should have appointed counsel to assist appellant in arguing the merits of his petition.

SUMMARY OF APPELLEE'S ARGUMENT

I. The district court properly denied appellant's petition, correctly concluding that it was without merit.

II. The district court properly refused appellant's request for counsel.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S PETITION, CORRECTLY CONCLUDING THAT IT WAS WITHOUT MERIT.

Appellant argues that the district court misconstrued the facts stated in his petition and consequently the order denying appellant's petition was erroneous (AOB 8).[2/] Although the district court may have misstated certain facts alleged in the petition, those facts did not form the basis for the court's decision and therefore appellant's argument is without merit.

The district court dismissed appellant's petition because the facts as alleged were unreasonable in the absence of some indication that appellant's counsel was inadequate or that he at least had informed

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2. Appellant sets forth several examples of instances where the court's interpretation of the pleaded facts differs insignificantly from the facts as stated in the petition (AOB 10-13).

his counsel of the incredible plot against him (TR 124-25). The court points out that appellant does not say what role, if any, his counsel played in the decision to change pleas, and concludes that "it would be unreasonable . . . to assume that [appellant] . . . did not consult with counsel with respect to the advisability of entering a plea of guilty . . . ." (TR 125:14-17). The court found this omission more significant in light of appellant's alleged fear of asexualization (TR 125).

In the absence of some reference to the role of his counsel, appellant's allegations are "palpably incredible" and the denial of his petition was proper. Machibroda v. United States, 368 U.S. 487, 495 (1962); United States v. Fay, 336 F.2d 272 (2nd Cir. 1964).

We can only conclude, as the district court implies, that the only reason appellant does not allege any communication with his counsel respecting the plot to coerce his plea of guilty is that no such plot ever existed and his change of plea was purely voluntary. Certainly some minimum degree of candor must be exacted from state prisoners seeking federal habeas corpus relief. Compare In re Swain, 34 Cal.2d 300, 209 P.2d 793 (1956). In this respect, it should also be noted that appellant waited some five years after entry of his plea to present this

story to the courts, and then did so only after he had committed an offense which resulted in a second conviction and revocation of his parole.

II

THE DISTRICT COURT PROPERLY REFUSED APPELLANT'S REQUEST FOR COUNSEL.

Appellant also alleges that the district court should have appointed counsel to argue the merits of his petition (AOB 15).

With respect to counsel in habeas corpus proceedings in the federal courts, it has long been recognized that "indigent state prisoners are not entitled to court-appointed counsel unless under the circumstances of the particular case this is required in order to attain due process of law." Eskridge v. Rhay, 345 F.2d 778, 782 (9th Cir. 1965), cert. denied, 382 U.S. 996 (1966); accord, Hatfield v. Bailleaux, 290 F.2d 632, 635 (9th Cir. 1961), cert. denied, 368 U.S. 862 (1961); Schlette v. California, 284 F.2d 827, 836 (9th Cir. 1960), cert. denied, 366 U.S. 940 (1961). Obviously, the district court was of the opinion that appellant's case did not merit appointment of counsel and it was within his discretion to so order.

/

/

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the order of the District Court denying the writ of habeas corpus should be affirmed.

DATED: November 1, 1967.

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

MICHAEL J. KELLY
Deputy Attorney General

Attorneys for Appellee.

MJK:em
CR SF
66-962

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: November 1, 1967.

MICHAEL J. KELLY
Deputy Attorney General

22256A ✓

22256

FILED

MAY 29 1968

WM. B. LUCK, CLERK

IN THE

COURT OF APPEAL

OF THE

STATE OF CALIFORNIA

Ninth APPELLATE DISTRICT

FEB 2[illegible]1969

Willa G Skelton Attorney Pro Per

VS.

Trustee Richard R. Clements, Herbert A Wolas
Attorney For Trustee — Enright Elliott and Bet
Attorneys for First Federal Savings and
Loan Association.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLA G. SKELTON, Appellant. vs. RICHARD R. CLEMENTS, TRUSTEE - HERBERT A. WOLAS, ATTORNEY FOR TRUSTEE, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION, SANTA MONICA CALIFORNIA and COUNSEL FOR SAID FIRST FEDERAL MICHAEL FITZPATRICK, ATTORNEY. Appellee and ASSOCIATED CONSPIRATORS.	NO.22256 and 22256A

BRIEF OF APPEAL

APPEAL FROM THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

(RE: 3809 FW - BANKRUPTCY)

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLA G. SKELTON, Appellant. vs. RICHARD R. CLEMENTS, TRUSTEE et al, Appellee.	NO. 22256 and 22256A I STATEMENT OF FACTS RE: NATURE OF APPEAL II LEGAL ISSUES OF APPEAL AND ERRORS IN LAW III INJURY AND LOSS SUFFERED BY APPELLANT

I
STATEMENT OF FACTS RE: NATURE OF APPEAL

Appellant, WILLA G. SKELTON, filed a petition in Voluntary Bankruptcy Proceedings, November 21,1966. With said petition, appellant filed a list of creditors with debts owing and a FINANCIAL BALANCE SHEET.[1]

Appellant's husband, CHARLES W. SKELTON, now deceased 11/14/67, also filed a petition in conjunction with the above listed petition of November 21,1966.

Appellant filed the above listed petition for the purpose of placing appellants property under the jurisdiction of the Bankruptcy Court.

foot-note 1, TRANSCRIPT OF RECORD pgs. 2-7.

Therafter, this Appellant filed detailed schedules on December 1,1966. Then on December 27,1966,a Creditors Meeting was held and the Appellant's and appellant's husband's petitions in Bankruptcy were accepted as filed.

REFEREE J.J. RIFKIND appointed RICHARD CLEMENTS, AS TRUSTEE.

This Appellant and husband CHARLES W. SKELTON in good faith entrusted to the Bankruptcy Court real property valued at $270,000.00 according to Court Appraisal. [1]

This Appellant and husband CHARLES W. SKELTON owed no personal debts whatsoever. All the debts listed in Bankruptcy were the costs of construction in completing the apartment complex as listed in COURT APPRAISAL.[1]

Appellant accepted the pledge of the UNITED STATES GOVERNMENT as set forth in the BANKRUPTCY ACT to protect the property of this petitioner in Bankruptcy Proceedings through the authority and agency of the Federal Courts.

Today that pledge of immunity and protection of a Bankrupt and the Bankrupt's property has been violated by open seizure of the Appellant's property in spurious replevin actions that are unlawful in the STATE OF CALIFORNIA re: Real Property - and which are not legally allowable under the BANKRUPTCY ACT.

Acts of fraud and trickery by the TRUSTEE , this Appellant avers have been the aid and means by which

*footnote See exhibit A.

Respondent FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION of Santa Monica has defied and made mockery of the legal process of law and order under the BANKRUPTCY ACT.

This Appellant has suffered physical violence at the hands of the agents of the Appellees of the present Appeal.

Great and irreparable loss and damage is now suffered by this Appellant because of the seizure of my family's home, of my family's eviction therefrom by armed gangsters even while Appellant and family trusted to the immunity of said possession of their home under the lawful BANKRUPTCY PROCEEDURES duly invoked by this Appellant by the filing of PETITION FOR BANKRUPTCY PROCEEDINGS on November 21,1966.[1]

IN BRIEF, the purpose of this appeal is to establish truth and justice where now stands libel, fraud and utter disregard for law and order in the actions and files of Bankruptcy Proceedings in this Appellant's Case #3809 FW. The statement of facts as made herein are set forth in the following or second part of this BRIEF as legal issues with statute and case law as authorities thereon.

* Exhibit B verified copy of Affidavit submitted to HONORABLE FRANCIS E. WHELAN

II

LEGAL ISSUES OF APPEAL, nee ERROR IN LAW
(1)

On January 6, 1967, Respondent FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION of Santa Monica, California,

a. defied the jurisdiction of the FEDERAL COURTS OF THE UNITED STATES OF AMERICA;

b. mocked the laws of CONGRESS of these UNITED STATES STATES OF AMERICA;

c. committed planned criminal acts of violence and seizure, using armed -gangsters as acting agents; [1]

d. evicted with violence and assault and battery this Appellant and family from legally possessed home as impounded under BANKRUPTCY PROCEEDINGS 3808 FW and 3809 FW.

e. Trustee RICHARD R. CLEMENTS turned his head the other way, disqualified himself as trustee by acting thereafter, unbonded, and in utter contempt of the duties imposed by the laws re: duties of Trustee in Bankruptcy Proceedings under the Bankruptcy Act of CONGRESS.

* footnotel See verified exhibit C
" 2 See verified exhibit D

Respondent FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION (hereinafter called FIRST FEDERAL) chose to resort to criminal methods and gangster tactics of seizure of legally impounded property of Bankruptcy Proceedings 3808 FW and this Appellants Proceedings under the Bankruptcy Act,

BECAUSE:

a. On January 5,1967 one day before the seizure was made, HERBERT WOLAS Attorney was approved by REFEREE RIFKIND as THE TRUSTEE'S ATTORNEY.[1]

b. HERBERT WOLAS was also FIRST FEDERAL'S Attorney and through and by him FIRST FEDERAL was confident a fortune could be seized, the property would net First Federal after bribes, and pay offs were made at least $60,000.00.

c. After January 5, 1967, TRUSTEE RICHARD R. CLEMENTS BECAME A PUPPET TRUSTEE; and thereafter held himself aloof from actual participation of any kind in the BANKRUPTCY PROCEEDINGS AFTER JANUARY 5 and 6, 1967 trustee RICHARD R. CLEMENTS defaulted in each and every duty as set forth in 11 USC 75, under Bankruptcy ACT

d. THE TRANSCIPT OF RECORD by its lack of Trustee Reports attests to the averments in part c of this section.

* footnote 1 See exhibit E

Respondent FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION SELF INCRIMINATED ITSELF, when this Appellant filed an order TO SHOW CAUSE if said respondent had any right whatsoever to seize and hold Bankruptcy impounded property and to institute STATE COURT ACTIONS subseqent to Bankruptcy Proceedings.[1] SAID Respondent replied to the OSC of this Appellant thus:

1. BECAUSE , said respondent held a TRUSTEE'S FORECLOSURE SALE DEED,

2, BECAUSE , said respondent was not enjoined from seizure by the referee at the FIRST MEETING OF CREDITORS.[2]

DID the advanced rights as listed above entitle the above listed Respondent to committ acts of aggression , at said respondent's own pleasure upon the property impounded by this Appellant on the filing a Voluntary Petition in BANKRUPTCY PROCEEDINGS November 21,1966.

11 USC 11a . Courts of Bankruptcy are invested with original jurisdiction in proceedings under the BANKRUPTCY ACT.

The power of Bankruptcy Court as to property under its Jurisdiction is paramount.

(Petition)
Portland Electric Power Co.
D.C.Or 1943, 976 Supp 877

Property of which a Bankruptcy Court has taken possession is thereby withdrawn from the jurisdiction of all other Courts .

HOWARD LANNIN MUSIC CORP D.C.PA 1937
18F Supp 883

* footnote 1 TRANSCRIPT OF RECORD pages 46 to 50.
2 " " 51

11

RE; FIRST FEDERAL'S DEED

The FORECLOSURE sale deed is worthless and not worth the paper it is written on because the first trust deed was recorded after materials and labor was delivered to the listed apartment complex before the FIRST TRUST DEED OF FIRST FEDERAL WAS RECORDED, and FIRST FEDERAL FORECLOSED without bonding same.

C.C.1203.56 - in CALIFORNIA CODES the costs of construction, if holder of first trust deed does not bond a foreclosure in amount of construction liens or file a notice of notice of non-responsibility before foreclosure then that foreclosure is invalid on the property so foreclosed and the owner has a right to file and foreclose a lien to right the record in title. Any use of said invalid foreclosure SALE DEED in transfer is a fraudulent act. CHARLES W. SKELTON on JANUARY 16,1967 filed lien 2440 Bk M 2444 pg 714[1] in the amount of $88,000.00 for his costs and consolidated liens of all construction CREDITORS. SAID LIEN is perfected by foreclosure and is ready for execution as soon as this Appeal is completed or the foreclosure is executed. CASE PRECEDENT is most famous case of such redemption from invalid foreclosure sale BATEMEN and KELLOGG 59CA 464 as explained and clarified in reference text CALIFORNIA REAL PROPERTY LAW OGDEN 1952 page 664.

*footnote See exhibit H for copy of lien.

ANSWER OF THIS APPELLANT ACCORDDING TO LAW

Now, this Appellant declares said Respondent FIRST FEDERAL has no defense whatsoever, according to law for the criminal seizure and possession of real property; for the filing and misrepresentation of replevin actions against the Appellant as legitimate processes of law;from the wanton acts injury and damages have accrued directly, upon not only upon this Appellant but upon the family of this Appellant.

THIS APPELLANT has trusted to the due process of law, while like the giant MAFIA,this criminal, this coward to accept said due process hires guns, falsely imprisons, and kills, just as surely as if this respondent had deliberatly put a bullet from those branished guns, IN SAID ADVERSARY'S HEAD.

WHAT does it do to a man, to see his family displaced at a point of gun from the only home possessed by them, to see his wife made to accept degradation of imprisonment in a COUNTY JAIL because that wife trusted the authority of our FEDERAL LAWS THE PRTECTION of laws duly invoked under the Bankruptcy Act? Each time one of the harassments took place CHARLES W. SKELTON'S heart faltered and weakened, his trust faltered in decency and law, finally it was too much for his overburdened heart to bear. HYPERTENSION was the direct cause of CHARLES W. SKELTON'S untimely death on November 14, 1967.

And that same Respondent dares to defend such wanton

acts, such criminal acts by smugly stating:

1. I own(a scrap of paper) a TRUSTEE' Sale Deed.
2. Referee Rifkind specifically refused to enjoin me so I now have the right to enter and possess as I see fit.

Now , this Appellant has made made the above statements not verbatim from the response on page, 51 of TRANSCRIPT OF RECORD. The above statements are the underlying meaning in those defenses offered(to the OSC ORDER filed by the Appellant January 31,1967) by the monied and powerful respondent FIRST FEDERAL.

This Appellant in the above ANSWER has first applied the principle of common law-

What is the truth in this controversy?

What is right and Just?

What crime has been committed against Justice and Right?

Now I,as a layman,make ANSWER(to the best of my ability as pro per) to FIRST FEDERAL by submitting to the Honorable APPELLATE JUDGES statutes and case law(I personally have searched out from the COUNTY LAW LIBRARY).

This Appellent, herewith submits said POINTS AND AUTHORITIES in the section of this BRIEF titled ERRORS IN LAW.

To substantiate the preceeding ANSWER made according to common law I submit with this Brief a petition for pertinent REPRTERS TRANSCRIPTS be submitted herewith.

ERRORS IN LAW (continued)

POINTS AND AUTHORITIES (Statute and Case Law)

This Appellant avers that BANKRUPTCY PROCEEDINGS in CASES 3808 FW and 3809 FW being tried herewith in the present Appeal are designated herewith as Referee Orders April 21 and 27 - Appeal22256 and Order Of May 2- Appeal 22256 A.

This Appelant therefor submits the following ERRORS IN LAW for a reversal of the above listed ORDERS. The ERRORS IN LAW are:

a. INSUFFICIENCY of evidence to support the ORDERS,
b. ORDERS are prejudicial and not according to LAW,
c. ORDERS violate AMENDMENTS V and XIV of the UNITED STATES OF AMERICA, abridging same,
d. ORDERS condone violence and lawbreaking,
e. ORDERS exceed the authority of the BANKRUPTCY COURT, and normal procedures at law,
f. ORDERS were submitted by unqualified TRUSTEE.
g. ORDERS are predominated by libel and are products of intrigue and fraud upon the BANKRUPTCY COURT.
h. No Adjudication of petitioners either by statute or COURT JUDGMENT.
i. EXCESSIVE DAMAGE SUFFERED BY ORDERS.

POINTS AND AUTHORITIES-continued

On November 21,1966, this Appellant and husband filed petitions IN BANKRUPTCY PROCEEDINGS UNDER THE BANKRUPTCY ACT. A list of creditors was filed with the petition in advance of schedules. See footnotes 1 and 2.

BANKRUPTCY ORDER 12c provides" If a bankrupt files the list of creditors in advance of schedules, the referee shall call the first meeting of creditors without awaiting the filing of schedules".

REFEREE RIFKIND AWAITED - filing of schedules before calling the first meeting of creditors which was an error in law.

THE PETITIONERS were solvent and committed no act of BANKRUPTCY in the petition filed by them NOVEMBER 21,1966.

11 USC(19) BY STATUTE THE PETIONERS WERE SOLVENT

" A person shall be deemed insolvent within the provisions of this ACT whenever the aggregate of his property shall not at a fair valuation be sufficient to pay his debts."

(The debts listed in the petitions were improvement of real property that was the asset listed in said petitions. THESE debts were charges against the property on which was placed materials and labor for such improvement. Labor and materials for said improvement was delivered and labor used FEBRUARY 15,1965 over 5 months before trust deeds were recorded against the property.)

THE PETITIONERS IN BANKRUPTCY WERE NEVER ADJUDICATED BANKRUPT EITHER BY DECREE or by operation by law.

11USC (1)

"ADJUDICATION" shall mean a determination whether by decree or operation of law, that a person is BANKRUPT.

11 USC 41 (f)

The filing of voluntary petition under CHAPTER I TO VII of this ACT----- shall operate as an adjudication with the same force and effect as a decree of adjudication.

The ORIGINAL PETITION filed NOVEMBER 21,1966, was not filed under CHAPTERS I to VII. THE PETITIONERS were solvent at time of petition,(in BANKRUPTCY) , was filed so no inferred placement in CHAPTERS I to VII could have been made because the face of the petition voided such a placement.

No automatic adjudication was made by REFEREE RIFKIND on the ORIGINAL PETITION filed NOVEMBER 21,1966 therefor.

REFEREE again committed an error in law. REFEREE KINNISON in DISCHARGE OF BANKRUPT supplied an untrue statement or a statement contrary to evidence . IN the 4th line of said document it is stated that Willa g. Skelton,present Appellant was adjudged a BANKRUPT on a petition filed by him on the first day of DECEMBER 1966.

SAID REFEREE made an error in law which caused great loss and damage to this Appellant. NO PETITION was filed DECEMBER 1,1966 only a schedule of affairs.

ON page 53 of TRANSCRIPT OF RECORD REFEREE KINNISON has stated in a document titled DISCHARGE OF BANKRUPT that,

"WILLA G. SKELTON was duly judged a bankrupt on a petition filed by him (her) on the 1st day of DECEMBER 1966."

SUCH an adjudication was not by decree so it had to be by exercise of law, which would be an automatic adjudication under 11 USC 4if, which can only be made on the ORIGINAL PETITION.

SUCH an automatic adjudication by exercise of law is void because no petition in BANKRUPTCY was filed December 1, 1966. SCHEDULES were filed on December 1, 1966 and it is to these schedules the referee refers, because on the forepage of the schedules this Appellant inadvertently failed to cross out the word petition and write in SCHEDULES.

SUCH AN INADVERTENT MISTAKE is automatically voided since only the ORIGINAL PETITION was filed according to the BANKRUPTCY ACT in the office of CLERK OF THE DISTRICT COURT of THE UNITED STATES, CENTRAL DIVISION, LOS ANGELES, November 21, 1966.

PLEASE refer to exhibit G, the undeleted DOCKET of the REFEREE as originally was of record in file 3808 and 3809 FW BANKRUPTCY CASES, in the BANKRUPTCY COURT presided by RAY H. KINNISON . -NOTE. The verified document filed on page 197 is a false and badly executed false document especially prepared and filed in the TRANSCRIPT OF RECORD to hide the many errors in law made by the administration of unlawful procedures,not allowable in a BANKRUPTCY COURT under the BANKRUPTCY ACT.

AUTHORITIES RE:
FIRST FEDERAL'S SEISURE OF PROPERTY

FIRST FEDERAL admitted guilt of seizing BANKRUPTCY PROPERTY by advancing rights in the said seizure by FIRST FEDERAL. See page 51 in TRANSCRIPT OF RECORD and exhibit BOTH are copies of two reponses made to OSC Order.

SINCE FIRST FEDERAL admitted the seizure, the question inlaw to be answered next is,

When property is in costructive possession of the Bankruptcy Court, can a third party file a Replevin* ACTION in a STATE COURT and use same fraudulently as restitution of premises after foreclosure especially when BANKRUPTCY COURT held custody.

PROPERTY WHEN SEIZED WAS IN CUSTODY OF COURT

(explanation by REFEREE RIFKIND after appointment of TRUSTEE)

COURT: The TRUSTEE is the administrator of the estate. The Court hears matters and determines matters. He is charged with the responsibility of administering the estate. All right, this Court will stand recessed

Page 66
REPORTER'S TRANSCRIPT of
FIRST MEETING OF CREDITORS
December 27, 1966.

SINCE Courts of Bankruptcy are created and perform by statute of CONGRESS of the UNITED STATES any act against Authority of the Bankruptcy Court is also in defiance to the UNITED STATES OF AMERICA'S Federal laws.

WHAT IS LEGAL PROCESS TO GET RELEASE OF PROPERTY?

If the Bankrupt or agent is in possession of property at the time of filing of a BANKRUPTCY PETITION, (nextpage)

*footnote - SEE replevin Bond pg 33 in TRANSCRIPT OF RECORD
USED FRAUDULENTLY TO SEIZE Bankruptcy Property
Calif. Codes limit replevin to personal property

A SUSEQUENT ATTEMPT TO SEIZE THE PROPERTY BY REPLEVIN is an interference with the custory of the Bankruptcy COURT.

ONCE custody or constructive possession of the property has come to the BANKRUPTCY COURT through institution of Bankruptcy Proceedings the only proper method of obtaining release of the property is PETITION TO RECLAIM.

PARAGRAPH 2070
page 165 vol 5
REMNINGTON ON BANKRUPTCY.

Where property is in custody of the Bankruptcy Court no party may seize it by legal process or otherwise without the leave of the Bankruptcy Court.

In Re Bergin 55 F Supp 32

Miller v Mangus
125 22 D 507

In re Ripp 242 F 2d 849.

In 11 USC 110c the trustee may have the benefits of all defenses available to the Bankrupt as against third persons and the trustee AT THE DATE OF BANKRUPTCY, SHALL BE deemed vested as of such date with all the rights, remedies and powers of a creditor holding, a lien as to all property.

11 USC c gives the TRUSTEE creditor's rights against the property of third parties through doctrines of ostensible ownership, or related legislation such as factors acts.

annotation page127
The Bankruptcy Act
by
JAMES ANGELL MACLACHLAN

FALSE ARREST

APPELLANT INJURED

The Bankruptcy Act provides immunity under section 11 USC 25 (10) under the BANKRUPTCY ACT and the FIFTH Amendment to the CONSTITUTION OF THE UNITED STATES, TO THE BANKRUPT for any information -testimony given at the First Creditors Meeting. Such testimony is not to be used as evidence in any criminal proceeding in any court whatsoever. W.F.S. Yet First Federal's Counsel stood in State Court with Reporters TRANSCRIPT in hand - of First Creditors Meeting 12-27-66 and used same as evidence of Willa G. Skelton's statements and secured her FALSE arrest.

This Appellant upon the cooperation and help of TRUSTEE RICHARD R. CLEMENTS, under an old obselete restraining order not to collect rents under case SWC 9551 now the subject of Appeal 22256 wherein, FIRST FEDERAL would,if the order is not reversed, gain immunity from future law suits for injury sustained in the false arrest, wherefor ORDER of April 21 and 27 violate CONSTIUTION

THIS APPELLANT submits the transcript now held in JUDGE WHELAN'S DISTRICT COURT, Los Angeles, AND INCORPORATES SAME BY REFERENCE(AS IF SAME WERE repeated verbatim) in this BRIEF as evidence. TRANSCRIPT so referred to is, REPORTER'S TRANSCRIPT HEARING SWC 9551 January 25,26, 1967.

WHEREFOR, this Appellant now prays that the COURT reverse the ORDERS April 21, April 27 and May 2, and award deemed justified by this COURT.

April 13,1968

Willa G. Skelton

WILLA G. SKELTON

Appellant- PRO PER

County of Los Angeles) ss
State of California))

Affidavit of Mailing

Charles Stephen Skelton am a citizen of the United States and a resident the county of Los Angeles. California. I am over 18 years of age d am not a party to the foregoing legal case at law.

April 14, 68 I served the attached document named a BRIEF the respondents herein by depositing a copy thereof enclosed in separate sealed and addressed envelope with postage thereon lly paid. in the UNITED STATES MAIL at Lomita California, each of which envelopes was addressed respectively as follows:

Enright Elliott and Betz
Suite 703 -606South Hill
Los Angeles, California

(Attorneys for
FIRST FEDERAL SAVINGS AND LOAN
ASSOCIATION
OF SANTA MONICA CALIFORNIA)

ATTORNEY HERBERT A. WOLAS
Suite510
408 South Spring
Los Angeles California

Attorney for
TRUSTEE RICHARD R. CLEMENTS

swear and attest the foregoing statements are true d correct.

cuted on April 15 1968.

Charles Stephen Skelton

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Dated April 15, 1968

Nella G. Skelton
Assistant

Subscribed and affirmed before me

[illegible]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLA G. SKELTON and CHARLES W. SKELTON, Appellants, vs. RICHARD R. CLEMENTS, Trustee, Appellee.	)	No. 22256 22256A APPELLEE'S OPENING BRIEF

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FILED

JUN 4 1968

WM. B. LUCK, CLERK

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLA G. SKELTON and CHARLES W. SKELTON, Appellants, vs. RICHARD R. CLEMENTS, Trustee, Appellee.	)	No. 22256 22256A APPELLEE'S OPENING BRIEF

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Now comes RICHARD R. CLEMENTS, Trustee in Bankruptcy for the bankrupt estates of WILLA G. SKELTON and CHARLES W. SKELTON, Appellee herein, and submits his Appellee's Opening Brief.

INTRODUCTION

1. This appeal is but another attempt by Appellants to use the process of this and other Courts to their own end. (It should be noted that CHARLES W. SKELTON has become deceased during the pendency of this Appeal.) It should also be noted that only WILLA G. SKELTON is appealing the Order of May 2, 1967, whereas WILLA G. and CHARLES W. SKELTON are the named appellants with reference

to the Orders of April 21st and April 27th, 1967.

2. Appellants, in an effort to forestall a foreclosure proceeding on certain real property, filed proceedings under Chapter XI of the Bankruptcy Act in May, 1966. Ultimately, the Chapter XI proceedings were dismissed in September, 1966. Thereafter, Appellants filed a voluntary petition in Bankruptcy on November 21, 1966, (CLK Tr Page 2) and Appellee herein was appointed Trustee in Bankruptcy for both estates.

3. Lawsuits were brought by Appellants against FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SANTA MONICA, TITLE INSURANCE & TRUST COMPANY and others. During the course of the administration of these bankrupt estates, the Trustee examined into said suits and has, with the approval of the Bankruptcy Court, compromised certain of said suits. The action against FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SANTA MONICA was settled by payment to the bankrupt estates of Two thousand two hundred fifty and no/loo ($2,250.00) Dollars by FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SANTA MONICA. Additionally, the suit against TITLE INSURANCE & TRUST COMPANY has been settled and TITLE INSURANCE & TRUST COMPANY has paid to the bankrupt estate the sum of Five thousand ($5,000.00) Dollars. Additionally, the Trustee in Bankruptcy has invalidated certain security interests on personal property and said personal property has been sold by the Trustee in the course of administration of this estate.

4. Appellants continuing their attempts to frustrate the administration of these bankruptcy estates are now seeking to review

(a) The Order of the Referee dated April 21, 1967, (CLK Tr Page 75) approving the compromise of controversy with FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SANTA MONICA;

(b) The Order of April 27, 1967, (CLK Tr Page 85) approving the sale of personal property; and

(c) The Order of May 2, 1967, (CLK Tr Page 6 of Supplemental Transcript) denying the application by WILLA G. SKELTON to dismiss her bankruptcy proceedings.

5. On July 6, 1967, the District Court Judge WHELAN dismissed the petition for review of the Orders of April 21 and April 27, 1967, (CLK Tr Page 154) and on October 5, 1967, the District Court Judge WHELAN confirmed the Order of the Referee made on May 2, 1967, (CLK Tr Page 6, Appeal No. 22256A).

ARGUMENT
RE ORDERS OF APRIL 21 AND APRIL 27, 1967

6. These Orders dealt with the administration of the bankruptcy estates. The former dealing with the settlement of a lawsuit and the latter dealing with a sale of personal property. Both assets were subject to administration.

7. The Trustee in Bankruptcy was vested with the causes of action pending at the date of the filing of the bankruptcy. Section 70a(5) of the Bankruptcy Act; Section 688.1 of the California Code of Civil Procedure; ROBINSON vs. CARMONA, 336 F. 2d 518. Likewise, the personal property of the bankrupts passed to the Trustee, Section 70a of the Bankruptcy Act, and the Orders with regard to the settlement of the suit against FIRST FEDERAL SAVINGS & LOAN

ASSOCIATION OF SANTA MONICA and the sale of personal property were procured in conjunction with the duties imposed by law on the Trustee to collect and reduce to money the property of the estates for which he is Trustee.

Section 47a of the Bankruptcy Act.

8. The Trustee filed his petition to sell certain personal property on February 13, 1967, and same was sold to the highest bidder in open court per order of April 27, 1967, and the Trustee filed his application to compromise controversy with FIRST FEDERAL SAVINGS & LOAN ASSOCIATION OF SANTA MONICA on March 21, 1967, and same was confirmed by the Referee on April 21, 1967. In both instances notice of the hearing was given to creditors as required by the Bankruptcy Act and said Orders were confirmed after hearing. No creditors opposed the entry of the Orders. The reviews were filed by the bankrupts.

9. It is quite clear that a review of a Referee's order may be taken only by a "person aggrieved by the order".

Section 39(c) of the Bankruptcy Act, 11 U.S.C. 67(c).

10. The authority conferred by Section 39(c) of the Bankruptcy Act to petition for review of a Referee's order is restricted and is granted only to those who have immediate interests in the bankrupt estate as such and does not include those who would be indirectly affected by the order.

ROGERS vs. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION, 142 F 2d 128, 129.

11. The bankrupts were not persons aggrieved by the Orders (of April 21 and 27, 1967) of the Referee with regard to the liquidation of the bankrupt estate.

HARTMAN CORPORATION OF AMERICA vs. U. S., 304 F. 2d 429.
CASTANER vs. MORA, 216 F. 2d 189.
See also In re HENRY WOOD SONS CO., 279 F. 60.

12. Even if the review herein was by a "person aggrieved" there is no showing that the Orders of April 21 and 27, 1967, were not proper or that the Referee was clearly erroneous in confirming said sale and said compromise.

General Order in Bankruptcy No. 47.
ROGERS vs. GARDNER, 226 F. 2d 864.

ARGUMENT RE ORDER OF MAY 2, 1967

13. On March 8, 1967, the bankrupt filed a Petition for Abandonment of Bankruptcy Petition and Proceeding. Subsequent thereto, notice was given pursuant to Section 58 and 59(g) of the Bankruptcy Act, and the matter was set for hearing for April 27, 1967. At said hearing the bankrupt appeared in Pro Per, and the Trustee appeared by and through his counsel, ROBINSON, WOLAS & HAGEN, and a creditor, FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SANTA MONICA, appeared by and through its counsel, ENRIGHT, ELLIOTT & BETZ, Counsel for the Trustee on behalf of general creditors and counsel for FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF SANTA MONICA opposed the application to dismiss. As a result of said hearing the Order of May 2, 1967, denying the application for dismissal of bankruptcy proceedings was made and entered, which Order

is now being reviewed by WILLA G. SKELTON.

14. The bankruptcy proceedings of WILLA G. SKELTON were commenced as a voluntary petition under the Bankruptcy Act filed on November 21, 1966. That since the filing of these bankruptcy proceedings a Trustee has been appointed and the estate has been administered. During the course of the administration, two lawsuits have been compromised pursuant to Order of Court, liens of various secured creditors have been invalidated, and the Trustee in Bankruptcy has sold assets to third party purchasers. A further review of the claims on file in the bankruptcy proceedings of WILLA G. SKELTON will reveal that there are approximately eleven (11) creditors who have filed proof of claim and the total indebtedness due said eleven (11) creditors exceeds $39,000.00.

15. The Referee in Bankruptcy, having full knowledge of all of the facts of this case, has exercised his discretion in determining that it was in the best interests of creditors of this estate that these bankruptcy proceedings not be dismissed. The power of the Court in the exercise of judicial discretion, to dismiss a bankruptcy proceeding, when the prescribed conditions have been complied with is clearly implied but the Bankruptcy Act does not confer upon the bankrupt or any other applicant an absolute right to have the proceedings dismissed. Furthermore, the Order of the Referee will not be disturbed unless said Order is clearly erroneous.

General Order in Bankruptcy No. 47.
ROGERS vs. GARDNER, Supra.

There is nothing in the record before this Court to indicate

that the Order of the Referee affirmed by the District Court is clearly erroneous and quite to the contrary, it is in the best interests of creditors of this bankrupt estate that said bankruptcy administration continue and creditors, in fact, oppose the dismissal of said bankruptcy proceedings.

In re STRUNKS LANE (D.C.K.Y. 1946) 64 F. Sup. 731.

16. The law is well setted that there is no right by the bankrupt to withdraw a voluntary petition in bankruptcy, after adjudication.

GOODRICH vs. ENGLAND (9th Cir. 1958) 262 F. 2d 298.
In re WEARE (D.C.N.Y. 1949) 87 F. Sup. 413.

17. There is nothing in the record which would indicate that creditors or any other party in interest has consented or would consent to the vacation of the adjudication. While there have been cases where orders have been granted vacating adjudication, they have been made upon the consent of all of the creditors and all parties who have interests in the proceeding. It is the rule founded upon sound principles that permission to vacate an adjudication in bankruptcy will not be granted where it would result in either reducing or effecting the claim of creditors in the bankruptcy.

In re WEARE (D.C.N.Y. 1949) 87 F. Sup. 413.
In re RIORDAN, 95 F. 2d 454.

18. In the event there would be a dismissal of these bankruptcy proceedings, there is no assurance that the assets would be made available for the payment of the creditors' claims. A review of the bankruptcy schedules show that the bankrupt herein scheduled secured

creditors in the approximate amount of $147,000.00 and general unsecured creditors in the amount of $51,593.00. The Petition to Dismiss the bankruptcy proceedings was not accompanied by consents of creditors, contained no offer for the settlement of the claims of creditors and offered no assurance that the assets in the hands of the Trustee would be made available for the payment of creditors' claims nor was there any offer to pay the costs of the bankruptcy proceedings already incurred.

GERSING vs. SHINBERG (C.C.D.C. 1944)
140 F. 2d 706.

CONCLUSION

19. For the foregoing reasons, the Orders of the Referee of April 21 and 27, 1967, as confirmed by the District Court on July 6, 1967, and the Order of the Referee of May 2, 1967, as confirmed by the District Court on October 5, 1967, should be affirmed.

Respectfully submitted,
ROBINSON, WOLAS & HAGEN

By _____
HERBERT WOLAS
Attorneys for Appellee

AFFIDAVIT OF SERVICE BY MAIL

STATE OF CALIFORNIA)
ss.
COUNTY OF LOS ANGELES)

Ruth Miranda, being first duly sworn, says: That affiant is a citizen of the United States, a resident of the County of Los Angeles, California; over the age of eighteen years and not a party to the within action or proceeding; that affiant's business address is 408 South Spring Street, Los Angeles, California; that on May 10, 1968, affiant served the within Appellee's Opening Brief on the Appellants in said action by placing a true copy thereof in an evelope addressed to the parties listed below as follows: WILLA G. SKELTON and CHARLES W. SKELTON, 2444 W. 255 Street, Lomita, California, and then sealing said envelope and depositing same, with postage prepaid thereon, in the United States Post Office, at Los Angeles, California; that there is a regular communication by mail from said Post Office of deposit to the place so addressed. I certify (or declare) under penalty of perjury that the foregoing is true and correct. Executed on June 3, 1968, at Los Angeles, California.

Ruth Miranda

Subscribed and sworn this 3rd day of June, 1968.

Notary Public in and for said County and State.

STATE OF CALIFORNIA)
ss.
COUNTY OF LOS ANGELES)

I certify that in connection with this brief, I have examined Rule 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion the foregoing brief is in full compliance with those rules.

Herbert Wolas
HERBERT WOLAS

Subscribed and sworn this 3rd day of June, 1968.

Ruth Miranda
Notary Public in and for said County and State.

NO. 22257

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN SCOTT MAYHEW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

WM. MATTHEW BYRNE, JR.,
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NO. 22257

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN SCOTT MAYHEW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from a conviction of conspiracy to receive, conceal and facilitate the transportation of marihuana after illegal importation in violation of Title 21, United States Code, Section 176(a). Appellant, co-defendant SANDRA LEE HALLOCK, and indicted co-conspirator THOMAS J. WORKMAN, were indicted on January 11, 1967 [C. T. 2]. 1/ Appellant and co-defendant both entered a plea of not guilty and trial by jury commenced on April 9, 1967, before the Honorable Jess W. Curtis, United States District Judge, Central District of

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1/ C. T. refers to Clerk's Transcript.

California. On April 7, 1967, both defendants were found guilty and appellant was sentenced to six years imprisonment on April 24, 1967 [C. T. 16]. Jurisdiction of the District Court was based on Section 176(a), Title 28, United States Code and Section 3231, Title 18, United States Code. Jurisdiction of this Court to entertain the appeal is derived from Sections 1291 and 1294, Title 28, United States Code.

II

STATUTE INVOLVED

Title 21, United States Code, Section 176(a) provides in pertinent part:

> " . . . whoever, knowingly, and with intent to defraud the United States . . . receives, conceals, . . . or in any manner facilitates the transportation, (or) concealment . . . of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five years or more than twenty years and, in addition, may be fined not more than $20,000 . . .
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall

be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

III

STATEMENT OF FACTS

On December 4, 1966, Ronald McAuley attended a pre-arranged meeting [R. T. 86, 87] [2/] at the Carriage Inn Motel, Van Nuys, California, at which time appellant stated that he desired someone to bring marihuana into the United States from Mexico [R. T. 90]. Several conversations ensued in the next few days before a meeting was accomplished between McAuley, appellant, and co-defendant Hallock on December 17, 1966 [R. T. 92] at which time definite plans were made for McAuley to drive a load of marihuana from Mexico into the United States [R. T. 95]. A car was purchased in Los Angeles by the appellant to transport the marihuana [R. T. 98]. Appellant then met McAuley in Mexico [R T. 105], on December 17, 1966, confirmed the transportation of the contraband and gave McAuley a telephone number to call when the marihuana was in the United States [R. T. 109]. On December 18, 1966 [R. T. 113] McAuley entered the United States driving the car previously purchased by appellant [R. T. 112]. After meeting with customs officials [R. T. 114], a phone call

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2/ R. T. refers to Reporter's Transcript.

was placed to the number supplied by appellant and details were arranged as to the pick-up of the marihuana in North Hollywood, California [R. T. 116, 119]. The automobile was then driven to the location designated in the phone call made by McAuley where it was picked up and driven away by co-defendant Workman [R. T. 119].

IV

ARGUMENT

THE TRIAL COURT DID NOT ERR IN PERMITTING ADMISSIONS MADE BY DEFENDANT IN THE FURTHERANCE OF THE CONSPIRACY TO BE INTRODUCED INTO EVIDENCE

To support his allegation that the Government made repeated references to the appellant's involvement in the field of narcotics which so prejudiced the appellant that he was denied a fair trial and impartial trial, counsel for the appellant cites page 52, lines 17 through 24, of the United States Attorney's opening statement which said that, "During this meeting, the two defendants were present with Mr. McAuley. Mr. McAuley was advised by defendant Mayhew that he was expecting marihuana from Mexico, that he was experiencing trouble with his runners; the people who actually drove the loaded vehicle up from Mexico with the marihuana. He referred to these people as his astronauts." There is nothing in that quotation or in any other portion of the opening statement that was not later substantiated by competent evidence. It is submitted that, from the defendant's point of view,

every allegation by the Government of facts that it intends to prove in support of the charges contained within the indictment is prejudiced, but it is axiomatic that the prosecution has a right to state those facts which the Government intends to prove. Corroboration of the contested opening remarks was provided by customs agent Norman Noordenvier on page 166, lines 2, 3 and 4 of the Reporter's Transcript, in which Agent Noordenvier quoted a conversation in which appellant used the exact terminology, referring to his runners, as the United States Attorney presented to the jury in his opening statement.

Counsel for appellant then accuses the United States Attorney on page 1 of his opening brief of alleging the statement found on page 85, lines 9 through 12. A reading of the transcript reveals that the debated remark was actually made by a Government witness in explaining a conversation made by the co-defendant Hallock in setting up the first meeting with the witness and appellant.

The remaining instances cited by counsel for appellant as constituting prejudicial error involve admissions by the appellant contained in conversations made in furtherance of the conspiracy for which he was convicted. For instance, counsel for appellant objects to a conversation on pages 88 through 92 in which the Government's witness testified that appellant outlined the difficulties that he was having in obtaining people to smuggle loads of marihuana and his desire for "a family type of person" to transport the marihuana. Again, the admissions by appellant to which his

counsel objected, which are contained on pages 96 and 107, related to the details of the plan to introduce marihuana into the United States from Mexico and appellant's prior activities in smuggling narcotics. Corroboration of the witnesses' testimony was afforded by a customs agent whose responses to questions by the United States Attorney are contested by appellant on page 3 of his opening brief. As the trial court properly stated on page 166, lines 12 and 13, "He (Agent Noordenvier) is recalling or stating the conversation which took place". Thus, in making his objections to admissions made by the appellant in furtherance of the conviction for which he was indicted and convicted, counsel for appellant has failed to take cognizance of the basic rules of evidence relating to the admissibility of admissions of a defendant.

Carbo v. United States, 314 F. 2d 718 (1963);

Enriquez v. United States, 314 F. 2d703 (1963).

A reading of the transcript reveals no such improprieties on the part of the United States Attorney as counsel for appellant has suggested. The Government welcomes the obligation placed upon it as a servant of all the citizens of the United States and the prosecuting attorney in this case followed the mode of conduct proscribed by the Supreme Court in Berger v. United States, 295 U.S. 78, 79 L. ed. 1314, 55 S. Ct. 629, in presenting competent, relevant testimony concerning the appellant's admissions as to his involvement in the conspiracy for which he was charged.

V

CONCLUSION

For the foregoing reasons it is respectfully submitted that appellant was not prejudiced by the introduction of his own admission into evidence and the judgment of the trial court should be affirmed.

Respectfully submitted,

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United States Attorney

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Attorneys for Appellee,
United States of America

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ John W. Hornbeck

JOHN W. HORNBECK

No. 22,259

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LEVINSON'S OWL REXALL DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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In the United States Court of Appeals for the Ninth Circuit

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LEVINSON'S OWL REXALL DRUGS, INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

---

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

JURISDICTION

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*),[1] for enforcement of its order issued against Levinson's Owl Rexall Drugs, Inc., herein re-

[1] Pertinent provisions of the Act are reprinted as Appendix A to this brief, *infra*, pp. 18-20.

ferred to as respondent or Company, on December 6, 1966. The Board's decision and order (R. 56-63)[2] are reported at 161 NLRB No. 133. This Court has jurisdiction of the proceeding, the unfair labor practices having occurred in Napa, California, where the Company is engaged in the business of selling drugs, cameras, and other products at retail. No jurisdictional issue is presented.

STATEMENT OF THE CASE

I. The Board's Findings of Fact

Briefly, the Board found that the Company violated Section 8(a)(1) of the Act by interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7. The Board further found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employee Beverly Marsh to discourage membership in or activities on behalf of the Union.[3] The evidence upon which the Board's findings are based is summarized below.

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[2] References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portions of the stenographic transcript reproduced pursuant to Court Rules 10 and 17 are designated "Tr." References designated "GCX" and "RX" are to exhibits of the General Counsel and respondent, respectively. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Board's findings; those following are to the supporting evidence.

[3] Retail Store Employees Union, Local 373, Retail Clerks International Association, AFL-CIO.

A. *The advent of the Union; the Company's coercive antiunion campaign*

In March 1965,[4] the Union began an organizational campaign among the employees of the Company at its Bel-Air Shopping Center store (R. 16; Tr. 469).[5] In April, a number of the employees signed cards authorizing the Union to be their collective bargaining representative (R. 16; Tr. 469, GCX 2, 4, 7). During the Union's organizing campaign in April, Company Secretary-Treasurer and Store No. 2 Manager John Frommelt called employee Anita Joyce Baierline into the employee coffee room and, with the door closed, inquired whether she had been approached by the Union (R. 15-16; Tr. 90). When Baierline replied in the negative, Frommelt stated that the Union would probably communicate with her. He told her that if the store became unionized the employees would make less money, besides having to pay dues. Frommelt also stated that it was possible that employees' "P.M.'s would be taken away." [6] He further stated that the Company had never been unionized and did "not intend to become Union now," and that if he should learn that Baierline was "for the Union" she would be "fired." (R. 16; Tr. 90-91).

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[4] Unless otherwise noted, all dates herein refer to 1965.

[5] The Company operates two stores in Napa. The Bel-Air Shopping Center store, also referred to in the record as Store No. 2, is involved in this proceeding. The other store, referred to in the record either as Store No. 1 or the main store, is not involved herein (Tr. 151-152).

[6] P.M. refers to premium money paid by certain companies when their products are sold; P.M.'s are paid to employees in addition to their regular wages (Tr. 91).

On the same day, John Frommelt called employee Charlotte McDonald into the employee coffee room and inquiringly stated that he assumed she knew that the Union was contacting the Company's employees. When McDonald answered affirmatively, he remarked that "any extra wages [the employees] might make joining the Union [they] would just pay back . . . in dues, that Levinson's was not Union, that they would never be Union and if [McDonald] had any intentions of joining a Union or trying to get a Union in the store, [she] would no longer have a job there." (R. 16; Tr. 9-11).

On the same day, Store Manager Frommelt also called employee Beverly Marsh into the employee coffee room and, like employees Baierline and McDonald, was interviewed in private. Frommelt alluded to her "many years" of employment and stated that "the Union has become active again—[the Company] would appreciate [her] loyalty in this matter. [The Company] just [doesn't] want any Union . . . [she] knew how [the Company] felt about the Union."[7] (R. 16, 57; Tr. 35, 37, 45).

In addition, John Frommelt interrogated employees Carl Shimell and Lillian Beem as to whether they were contacted by the Union (R. 16-17; Tr. 131, 307). Altogether, John Frommelt separately and

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[7] Marsh testified that in 1957 or 1958, the Union attempted to organize the Company's employees at Store No. 1; at that time, Store Manager Al Frommelt told Marsh, who was then employed at Store No. 1, that the store was not union, had no intention of becoming union, and that the employees would be dismissed if a union contract were signed (Tr. 38-40).

privately interviewed 7 or 8 of the 11 nonsupervisory store employees concerning their Union affiliation and activities (R. 16; Tr. 242-243).

During the Union's organizational campaign, the Company required job applicants to fill in an employment application form, which included a question as to the applicant's "union affiliation" and a space for his reply. During the 6-month period prior to date of service of the charge in this proceeding, 24 individuals applied for jobs and executed the employment application form, of which 8 left the union affiliation space blank, 2 indicated a union affiliation, and 14 answered in the negative (R. 15; Tr. 138, 141-142, GCX 5(a), 5(b), 5(c)).

On May 3, the Union distributed a leaflet, dated May 1, to the Company's employees, wherein it set forth wage rates and medical, retirement, holiday, vacation, and arbitration benefits provided in a union contract and the suggestion that they be compared with those provided by the Company (R. 21; Tr. 470, GCX 3).

B. *The discharge of union adherent Beverly Marsh*

Beverly Marsh was first employed by the Company in August 1946 and quit in March 1948, went back to work with the Company in March 1954 and terminated her employment in September 1961, and again reentered employment in July 1963. During most of her long tenure of employment with the Company, including her last period of employment, Marsh worked in the camera department (Tr. 33). On April 13, 1965, she signed a union authorization card (GCX 4).

A few days after receiving the Union leaflet dated May 1, Marsh brought it to the store with a view to discussing its contents with management. During a discussion with Assistant Store Manager Robert Frommelt concerning the leaflet, Marsh remarked that Levinson's "didn't seem to stack up too well" with the benefits being offered by the Union (R. 21, 57; Tr. 45-46, 391). Frommelt defended the store's current employee benefits, while Marsh compared the Company's benefits unfavorably with those offered by the Union in the leaflet. She specifically mentioned that her wages were lower than those shown in the leaflet; nor were the Company's hospital benefits adequate (R. 21; Tr. 47, 391).

On June 25, Marsh prepared unsold greeting cards for return to the supplier, for which the store would receive credit, dividing the cards into separate groups. She prepared necessary instructions for shipment and gave them, with additional instructions to ship the packages separately, to the employee who packs and ships store merchandise. Each package was shipped by parcel post, rather than by freight in a single package, which resulted in an additional shipping cost of $7 or $8 (R. 21; Tr. 54, 437-439, 442-443, 447). Shortly thereafter, Store Manager John Frommelt approached Marsh at the camera department and loudly and angrily berated her for causing the unnecessary shipping cost expenditure (R. 21-22, 57; Tr. 55, 169-170). Frommelt then walked out of the store (Tr. 55, 170, 219). Marsh, who was emotionally upset because of the reprimand, telephoned her physician and was advised to come to his office

immediately (R. 22, 57; Tr. 55-56). Unable to locate either John or Robert Frommelt in the store, Marsh told Floorlady Helen Duncan to inform John Frommelt that she was leaving the store (R. 22, 57-58; Tr. 56, 283). She left the store about 4:40 p.m., and went to her physician's office (R. 22, 58; Tr. 56). Marsh returned to the store after an absence of approximately 20 minutes of her working time,[8] sought out John Frommelt, and asked him not to admonish her publicly again. Frommelt thereupon discharged her for the stated reason of her absence from work (R. 22-23, 58; Tr. 58, 182, 208, 210).

II. The Board's Conclusions and Order

The Board, in agreement with the Trial Examiner, found that during the course of the Union's organizational campaign in April 1965, the Company violated Section 8(a)(1) of the Act by interrogating employees in private interviews as to whether they had been contacted by the Union, by interrogating job applicants as to their union affiliation, by stating to employee Baierline that premium pay would be discontinued in the event of unionization, by threatening to discharge Baierline if the Company found out that she favored the Union, by stating to employee McDonald that she "would no longer have a job" at the store if she had any intention of joining a union or "trying to get [one] in the store," and by telling these

[8] Marsh returned to the store at about 5:55 p.m. Her regularly scheduled dinner period was from 5:00 to 6:00 p.m. Her absence during working time was therefore about 20 minutes. (R. 22; Tr. 57-58, 182).

two employees that the Company would never be unionized.[9] The Board, contrary to the Trial Examiner, also found that the reason given by the Company for discharging employee Beverly Marsh—her 20-minute absence from work—was a pretext to conceal its determination to rid itself of a senior employee because she revealed herself as a Union adherent in spite of the Company's unlawful attempt to dissuade employees, and that she was, in fact, discharged on June 25, 1965, during the organizational campaign among the Company's employees, in order to discourage membership in or activities on behalf of the Union, in violation of Section 8(a)(3) and (1) of the Act. (R. 20, 28, 56-57, 58-59).

The Board's order requires the Company to cease and desist from the unfair labor practices found and from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights. Affirmatively, the order requires the Company to offer reinstatement to employee Beverly Marsh, to make her whole for any loss of pay suffered

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[9] At the Board hearing, the Trial Examiner granted the General Counsel's motion to amend the complaint by adding the allegation that "on or about April 2, 1965, in Respondent's Store No. 2, John A. Frommelt interrogated an employee concerning his Union membership, interest and activity, and threatened to terminate that employee if he selected the Union to represent him for purposes of collective bargaining or if he gave any aid or assistance to the Union" (Tr. 370, 377). The Board, in agreement with the Trial Examiner, dismissed this portion of the complaint (R. 19, 62).

as a result of the discrimination against her, and to post appropriate notices. (R. 60-61).

ARGUMENT

Substantial Evidence on the Record as a Whole Supports the Board's Finding That the Company Violated Section 8(a)(3) and (1) of the Act by Discharging Employee Beverly Marsh to Discourage Membership In or Activities on Behalf of the Union

As shown in the Statement, in April of 1965 many of the Company's employees began signing Union authorization cards and engaging in other organizational activity to select the Union as a collective bargaining spokesman. The Trial Examiner found that thereafter the Company, primarily through Store Manager John Frommelt, prevented the employees' complete freedom of choice, in violation of Section 8(a)(1) of the Act, by coercively interrogating applicants for employment and current employees concerning their union activity and views, telling employees that the Company would never accept unionization, and threatening employees with loss of job benefits and their jobs if they supported the union effort. The Company filed no exceptions to the Trial Examiner's findings that it had engaged in this clearly unlawful conduct. The General Counsel and the Union, however, filed exceptions to, *inter alia*, the Trial Examiner's dismissal of the allegation that employee Beverly Marsh had been discharged to discourage union activity. The Company submitted a brief in answer to these exceptions in which it urged affirmance of the Trial

Examiner's decision and entered no cross-exceptions to his findings of violations of Section 8(a)(1), which, accordingly, were adopted by the Board. In these circumstances, under the statute and Board procedures promulgated thereunder,[10] those 8(a)(1) findings are final and not subject to attack in the reviewing court.[11] Thus, the only issue presented is the propriety of the Board's finding that Marsh was discharged for anti-union reasons, in violation of Section 8(a)(3) and (1). We show below that the record amply supports that finding.[12]

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[10] See Section 10(c) and (e) of the Act, *infra* pp. 18-20, and Rules and Regulations of the National Labor Relations Board, as amended, Section 102.46 and 102.48(a) (29 C.F.R., Part 102, Sec. 102.46 and 102.48(a)), and specifically Section 102.46(h) which provides that "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Board, or in any further proceeding."

[11] See e.g., *N.L.R.B.* v. *International Association of Machinists, Lodge 942, AFL-CIO*, 263 F. 2d 796, 798-799 (C.A. 9), cert. denied, 362 U.S. 940; *N.L.R.B.* v. *Carroll-Naslund Disposal, Inc.*, 359 F. 2d 779 (C.A. 9), enforcing 152 NLRB 861; *American Fire Apparatus Co.* v. *N.L.R.B.*, 380 F. 2d 1005, 1006 (C.A. 8). See also, *N.L.R.B.* v. *International Union of Operating Engineers, Local 66, etc.*, 357 F. 2d 841, 846 n. 10 (C.A. 3).

[12] The Board's disagreement with the Trial Examiner on this issue does not significantly detract from the substantiality of the support for the Board's result. The Examiner's resolution of conflicting testimony was not disturbed. The disagreement related solely to the inferences to be drawn from the whole record and the proper application of the statute. In such a case, "the presumptively broader gauge and experience of members of the Board have a meaningful role." *Oil, Chemical & Atomic Workers Int'l. Union, Local 4-243* v. *N.L.R.B.*, 362 F. 2d 943, 946 (C.A. D.C.). Accord: *Cheney*

The discharge of a leading union adherent in a small unit of employees is a classic method of undermining an organizational campaign. Marsh was conspicuous in her support of the Union, but the Company contended that the sole reason for her discharge was, as she was informed at the time, her 20 minute absence during working hours. The Board, however, after full consideration of the proffered explanation, found that this was simply a pretext with which the Company sought to conceal its discriminatory purpose. The issue, therefore, is the real reason for the discharge: "[t]he existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N.L.R.B.* v. *Security Plating Co.*, 356 F. 2d 725, 728 (C.A. 9); *N.L.R.B.* v. *Tonkin Corp.*, 352 F. 2d 509, 511 (C.A. 9). This issue is one of fact, as to which the Board's determination, if supported by substantial evidence including all inferences fairly drawn from that evidence, is entitled to affirmance.[13] As this Court has repeatedly recognized: "When supported by credible evidence, the Board's choice between two conflicting views may not be displaced, 'even though

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California Lumber Co. v. *N.L.R.B.*, 319 F. 2d 375, 377 (C.A. 9); *F.C.C.* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364; *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496. Cf. *N.L.R.B.* v. *Tom Johnson, Inc.*, 378 F. 2d 342, 343-344 (C.A. 9).

[13] As this Court has stated, "[T]he Supreme Court . . . has laid to rest, quite properly, any contention that the uncontradicted evidence of an employer as to his motive for a certain course of action must be accepted by the Board." *Bon Hennings Logging Co.* v. *N.L.R.B.*, 308 F. 2d 548, 554 (C.A. 9).

the court would justifiably have made a different choice had the matter been before it *de novo.*'" *N.L.R.B.* v. *Howell Chevrolet Co.*, 204 F. 2d 79, 85, affd. 346 U.S. 482; *N.L.R.B.* v. *U.S. Divers Co.*, 308 F. 2d 899, 905; *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, 362 F. 2d 466, 469-470 (C.A. 9); *Aeronca Mfg. Co.* v. *N.L.R.B.*, —— F. 2d —— (C.A. 9), No. 21,305, November 1, 1967, 66 LRRM 2574. We show below that the Board's finding has the requisite evidentiary support.

As shown in the Statement, *supra*, pp. 4, 5, on April 13, Marsh signed a union authorization card. Subsequently, Store Manager John Frommelt called Marsh from her counter at the camera department for a private interview, similar to separate interviews with over half of the other 10 employees wherein coercive means to discourage unionization of the employees were applied. Frommelt alluded to Marsh's long tenure of employment with the Company (11 years) and appealed to her "loyalty" in resisting the Union. Notwithstanding this appeal, Marsh manifested an interest in union benefits in a discussion she initiated with management in early May, stating that benefits provided by the Company did not compare favorably with those provided by a union contract (*supra* p. 6). Marsh did not explicitly proclaim her union affiliation. Her expression of union sympathy, however, was clear enough for the Company to suspect her capacity for the "loyalty" which management had requested from her.

Subsequently, Marsh was implicated in mailing one set of returned goods in separate packages when they

could have been freighted together 7 or 8 dollars cheaper. Store Manager Frommelt immediately reacted in a manner unprecedented in his long relationship with Marsh, who had been responsible for many shipments over a long period of time. His reprimand in a public area of the store was so intemperate as to cause Marsh to telephone her doctor and to respond to the doctor's request to come to his office. Marsh reported to Floorlady Duncan that she was leaving, since neither the store manager nor the assistant manager was available in the store.[14] She returned to the store after a 20-minute absence from work, and confronted Frommelt to complain of the treatment accorded her. Frommelt summarily discharged her because of her absence, without inquiring why she had left the store (*supra*, p. 7).

The evidence of record shows that the Company had no rigid rule with respect to short absences from work. Nor was the store policy inflexible concerning when an employee should sign out on his time card for an absence during working hours (Tr. 227). Marsh's short absence to visit her physician for treatment resulted from John Frommelt's unprecedented public reprimand for a minor mistake. Because neither Frommelt was available at the time of her leaving, Marsh reported to a responsible individual in the store. Her absence was thus of the Company's own making, was taken with sensible precautions and,

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[14] Pursuant to Marsh's request (*supra*, p. 7), Store Manager John Frommelt was advised of her absence as soon as he returned to the store (Tr. 170, 283).

surely, her attempt on return to voice a protest over Frommelt's outburst reasonably warranted management's toleration. As the Fourth Circuit stated in *N.L.R.B.* v. *M & B Headwear Co.*, 349 F. 2d 170, 174: "An employer cannot provoke an employee to the point where she commits . . . an indiscretion . . . and then rely on this to terminate her employment. . . . The more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression . . . ." Accord: *N.L.R.B.* v. *Mrak Coal Co.*, 322 F. 2d 311 (C.A. 9); *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F. 2d 899, 904 (C.A. 2); *N.L.R.B.* v. *Morrison Cafeteria Co.*, 311 F. 2d 534, 538 (C.A. 8).

It is also significant that the record further shows that no other employee had ever been discharged for the offense of unauthorized absence from work, if, indeed, the absence under these circumstances may fairly be characterized as unauthorized. See, e.g., *N.L.R.B.* v. *Wix Corp.*, 336 F. 2d 824, 826 (C.A. 4). Moreover, other than an incident involving theft, no other employee had been discharged during the period of time pertinent to this proceeding, or for the past 3 years (Tr. 241-242). Cf. *Aeronca Mfg. Co.* v. *N.L.R.B.*, *supra*, —— F. 2d at ——, 66 LRRM at 2576. And in these circumstances, "[T]he fact that [Marsh was] abruptly discharged without warning is itself sufficient to make the alleged discharge for cause suspect . . ." *N.L.R.B.* v. *Dant*, 207 F. 2d 165, 168 (C.A. 9). Further, as the Trial Examiner noted (R. 28), the penalty of discharge for an employee of

such long tenure because of a 20-minute absence was "much out of proportion to her offense." This served to enhance the possibility that resort to the ultimate penalty of discharge would be a potent reminder to employees that management had this power to thwart the organizational effort, as, it is not contested, Frommelt had unlawfully threatened.[15]

In sum, the Company's action is not explained on the basis of the evidence it offered, while the evidence as a whole points to a discharge action taken in reprisal against the employee who had openly revealed herself as a Union supporter and appeared unshaken by management's resort to unlawful means to dissuade employees from union representation. The inference that Marsh's termination was motivated by her union adherence gains strong support from the failure of the reason advanced by the Company to withstand scrutiny. See, *N.L.R.B.* v. *Dant, supra*, 207 F. 2d at 167. Accord: *N.L.R.B.* v. *Griggs Equipment, Inc.*, 307 F. 2d 275, 278 (C.A. 5). "Nor is the trier of fact . . . required to be any more naif than is a judge. If he finds that the stated motive for a discharge is false, he certainly can infer that there is another motive. More than that, he can infer that

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[15] See, e.g., *N.L.R.B.* v. *McCormick Longmeadow Stone Co.*, 374 F. 2d 81, 82 (C.A. 1); *N.L.R.B.* v. *Superex Drugs, Inc.*, 341 F. 2d 747, 748-749 (C.A. 6); *N.L.R.B.* v. *Eastern Massachusetts Street Railway Co.*, 235 F. 2d 700, 708 (C.A. 1), cert. denied, 352 U.S. 951, for the principle that excessive penalties for minor violations during an organizational effort give support to a finding that the penalties were imposed because of union activity.

the motive is one that the employer desires to conceal —an unlawful motive—at least where, as in this case, the surrounding facts tend to reinforce that inference." *Shattuck Denn Mining Corp.* v. *N.L.R.B.*, *supra*, 362 F. 2d at 470. The Board, we submit, could draw that inference here, and reasonably conclude that this senior employee and advocate of union representation was not discharged for the reason given, but to discourage membership in or activities on behalf of the Union. *Aeronca Mfg. Co.* v. *N.L.R.B.*, *supra*, —— F. 2d at ——, 66 LRRM at 2576. Cf. *N.L.R.B.* v. *West Coast Casket Co.*, 205 F. 2d 902, 907 (C.A. 9); *N.L.R.B.* v. *Southern Desk Co.*, 246 F. 2d 53, 53-54 (C.A. 4); *N.L.R.B.* v. *West Side Carpet Cleaning Co.*, 329 F. 2d 758, 761 (C.A. 6); *N.L.R.B.* v. *Solo Cup Co.*, 237 F. 2d 521, 524-525 (C.A. 8). The Board's order, therefore, should be enforced. *N.L.R.B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 752 (C.A. 9), enforcing 88 NLRB 1262, 1269.

CONCLUSION

For the reasons stated, it is respectfully submitted that a decree should issue enforcing the Board's order in full.

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National Labor Relations Board.

December 1967.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of this Court and, in his opinion, the tendered brief conforms to all requirements.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Secs. 151, *et seq.*) are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * *

Prevention of Unfair Labor Practices

* * * *

[Sec. 10]

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that

any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * * In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

* * * *

(e) The Board shall have power to petition any court of appeals of the United States, . . . within any circuit . . . wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall file in the court the record in the proceedings, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and

to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, it member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the record . . . . Upon the filing of the record with it the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the . . . Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

APPENDIX B

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court. References are to pages of the original transcript of record.

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) - 1(f)	6	5	6
2	8	8	8
3	14	14	14
4	35	35	35
5(a) - 5(c)	149	148	149
6	298	298	298
7	434	434	434

RESPONDENT'S EXHIBITS

1	256	256	256
2	299	302	303

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No. 22,259

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

LEVINSON'S OWL REXALL DRUGS, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board.

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INTER-CITY PRINTING COMPANY, OAKLAND, CALIFORNIA 94607

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No. 22,259

IN THE

United States Court of Appeals

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NATIONAL LABOR RELATIONS BOARD,
Petitioner,

VS.

LEVINSON'S OWL REXALL DRUGS, INC.,
Respondent.

BRIEF FOR THE RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board.

JURISDICTION.

This case is before the Court upon the petition of the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended, for enforcement of its order issued against Respondent, Levinson's Owl Rexall Drugs, Inc., on December 6, 1966. This Court has jurisdiction of the proceeding. No jurisdictional issue is presented.

STATEMENT OF THE CASE.

In the above-entitled case, the Trial Examiner found the Respondent had engaged in unfair labor practices within the meaning of Section 8(a) (1) of

the National Labor Relations Act of 1947 as amended. Further, the Trial Examiner specifically found the record did not establish that Beverly Marsh was discharged in violation of the Act. (R. 29).[1] The Board upheld the Trial Examiner's finding with respect to the 8(a) (1) violation, to which Respondent did not take exception. But the Board, without the advantage of observing and hearing the witnesses, reversed the Trial Examiner and found a Section 8(a) (3) violation in the discharge of Beverly Marsh. (R. 59). Respondent contends that the Board is in error by so reversing the Trial Examiner and seeks to have this Court deny enforcement of that portion of the Board's order which is based upon violation of 8(a) (3). The evidence upon which the Trial Examiner's findings are based is summarized below.

Respondent Levinson's Owl Rexall Drugs, Inc., herein referred to as the Company, is a small corporation which operates two drug stores in Napa, California.[2] For several years the Company has been the subject of organizing activity by the Retail Store Employees Union, Local 373, Retail Clerks Inter-

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1. References to the pleadings, decision and order of the Board, the Trial Examiner's recommended decision and order, and other papers reproduced as "Volume I, Pleadings," are designated "R." References to portion of the stenographic transcript are designated "Tr." References designated "GCX" and "RX" are to exhibits of the General Counsel and respondent, respectively. Whenever in a series of references a semicolon appears, those preceding the semicolon are to the Trial Examiner's findings; those following are to the supporting evidence.

2. Although the Company operates two stores in Napa, only the Bel-Air Shopping Center store, also referred to in the record as Store No. 2, is involved in this proceeding.

national Association, AFL-CIO, herein referred to as the Union. It is uncontroverted that two previous organizational campaigns leading to elections had taken place, one in 1957-58 and the other in 1960-61. (Tr. 191). In neither case did the employees select the Union as their representative. In this long history of organizational activity, there is no showing that unfair labor practice charges have ever before been filed against the Company.

In the latter part of April, 1965, it came to the attention of John Frommelt, Manager of Store No. 2, that the Union was again active, at least with respect to the downtown store, No. 1. (Tr. 152). Believing the stores to be faced with yet another organizing campaign and desiring to inform the employees of the store's past relationship with the Union, John Frommelt held individual interviews with several of the non-supervisory employees of Store No. 2 (R. 16; Tr. 153, 155). Whether the interviews were violations of Section 8(a) (1) of the National Labor Relations Act, as held by the Trial Examiner, is not relevant to this proceeding, since the Company did not file exceptions to the Trial Examiner's finding on that count. Although there was conflicting testimony as to the content of John Frommelt's statements to the employees during the interviews (R. 16; Tr. 9-11, 90, 155), there was no allegation and no evidence whatsoever of any coercive interrogation of Beverly

Marsh. According to Mrs. Marsh herself, John Frommelt did not make any threats. He simply appealed to her loyalty in the light of her knowledge that the Company preferred not to be organized. (R. 16; Tr. 37, 60).

Beverly Marsh was working in the camera department of the store during April and May of 1965. (R. 21; Tr. 33). On or about May 4, 1965, Mrs. Marsh took the Union leaflet dated May 1, 1965 to work. (R. 21; Tr. 470, GCX 3). During the course of the day, she brought the leaflet to the attention of Robert Frommelt, the Assistant Store Manager, by pointing to the listed benefits and saying the Company "didn't stack up too well" (R. 21; Tr. 45-46, 62). Bob "jokingly" replied that he had also received a leaflet. (Tr. 61). Mrs. Marsh and Bob Frommelt then discussed the listed benefits, concluding with discussion of a vacation schedule of three weeks' vacation with pay after five years of employment. (Tr. 62). This caused Bob to comment: "I would sure be happy to get three weeks myself." (Tr. 391). According to Beverly Marsh, "We (she and Bob) didn't have an angry conversation." (Tr. 63).

After this conversation which, according to her, was not an angry one, Mrs. Marsh alleges that Bob Frommelt's attitude toward her changed. Bob became bossy, (R. 23; Tr. 49) and was "rarely there" (meaning in her area of the camera department). (Tr. 49).

As for John, Mrs. Marsh says he began to give her direct orders instead of asking her *if* she would do something. (Tr. 51). (emphasis supplied) Mrs. McDonald, a fellow employee, first stated that, after the leaflet conversation, Bob was not too friendly with Mrs. Marsh (R. 26; Tr. 17), but that he never got sarcastic or rough or mean. (Tr. 19). Later, Mrs. McDonald said that she thought initially this incident of the leaflet was "just a joke" but then she noticed "people weren't friendly with anybody" and this cool atmosphere involved all employees—not just Beverly Marsh. (R. 26; Tr. 26).

Another witness, Mrs. Baierline, could not recall when Bob ever criticized Mrs. Marsh's work, (R. 26; Tr. 115), and only once could she recall criticism by John. The constant "picking" on Mrs. Marsh alleged by Mrs. Baierline (R. 26; Tr. 94) was eventually defined as the assignment of more work than Mrs. Marsh could handle (R. 26; Tr. 115), but Mrs. Baierline could not recall any evidence that Mrs. Marsh had not completed any particular job. (R. 26; Tr. 116).

Mrs. Marsh herself alleged that her workload was increased after the conversation with Bob about the leaflet because John Frommelt closed the so-called "wild drawer." (R. 23-24; Tr. 51). However, John said that by closing the drawer, efficiency was improved, since Mrs. McDonald, the clerk in charge of

the liquor counter, could devote her full attention to her department. The change also improved the Company's check on discrepancies in the cash count between so-called "D" and "E" drawers. (R. 24; Tr. 187-188). Bob Frommelt stated that the change actually resulted in less work for Mrs. Marsh, and Bob McCromick, Mrs. Marsh's immediate supervisor, said it relieved camera department personnel from covering the liquor department. (R. 24; Tr. 396, 351). In fact, it was Al Frommelt, owner of the Company, who ordered the change, (Tr. 395), and there is not even an allegation on the record that he was unfriendly to Mrs. Marsh.

The excise tax project also was alleged to show an increase in Mrs. Marsh's work, despite the fact this task was assigned to all personnel in the department. Larry Dent stated that he did about twenty-five per cent of the excise tax work and he said that Bob Frommelt, Bob McCormick and Beverly Marsh each contributed to the project. (Tr. 340).

On June 25, 1965, Mrs. Marsh prepared greeting cards for shipment to one company. She divided them into three bundles, according to three specific holidays. She indicated by written instructions that the packages were to be shipped separately. The testimony of John and Bob Frommelt and Helen Duncan showed, and the Trial Examiner so found, that Mrs. Marsh

had the authority and the responsibility to designate how packages should be shipped. (R. 25-26; Tr. 180, 383, 290-292).

It is uncontroverted that shipping packages of over twenty pounds by freight rather than by parcel post is considerably less expensive. When John Frommelt noticed that three packages all weighing under twenty pounds—but of a combined weight of substantially over twenty pounds—were all shipped to the same company, he investigated. Upon learning from Mr. Gaston that Mrs. Marsh had given the instructions, John Frommelt angrily and publicly reprimanded Mrs. Marsh. (R. 21-22; Tr. 55, 169-170, 323). This apparently upset Mrs. Marsh and she left the store without explanation twenty to thirty minutes before her meal break. She did not inform anyone in authority but merely told one of the other girls, Mrs. Duncan, that she was leaving. (R. 22; Tr. 56, 283, 324-325).

Returning to the store five minutes before her dinner hour was over, Mrs. Marsh sought out John Frommelt before she reported to her station. She confronted him in the pharmacy sales section of the store where she upbraided him for criticizing her publicly. (R. 23; Tr. 58, 182, 308). This rebuke did not serve to calm John Frommelt since he had already been informed that Mrs. Marsh had left the job without permission. He asked her to come to the privacy of his

office and there he demanded to know whether or not she had in fact walked off the job. When she admitted this action and offered no explanation, John Frommelt terminated Beverly Marsh. A highly emotional woman, Mrs. Marsh said, "That's O.K. with me," picked up her time card, wrote "gratis" for the balance of the day and left the store. (Tr. 77).

The Board, after consideration of the transcript, found that John Frommelt seized upon Mrs. Marsh's twenty-minute absence as a pretext to conceal his determination to rid the Company of a senior employee because she revealed herself as a Union adherent. (R. 59). In a carefully reasoned analysis, after having seen and heard the witnesses testify before him, the Trial Examiner found it did not appear plausible that the reason given by John Frommelt was a pretext and that the Company would wait almost two months after Mrs. Marsh's alleged manifestation of Union interest to discharge her, especially at a time when her department was shorthanded. The Trial Examiner further stated that he had no reason to doubt John Frommelt was genuinely angry over the shipping waste. If he were looking for a pretext to support a discharge, he could have then seized upon this incident. Instead, the discharge took place after Mrs. Marsh returned to work and sought out John Frommelt to reproach him for criticizing her in public. It was not until Mrs. Marsh had failed,

in the ensuing conversation, to offer any explanation for her absence when given the opportunity to do so, that she was terminated. (R. 28).

ARGUMENT.

THE TRIAL EXAMINER'S FINDING THAT THE COMPANY DID NOT DISCHARGE BEVERLY MARSH TO DISCOURAGE MEMBERSHIP IN OR ACTIVITIES ON BEHALF OF THE UNION SHOULD NOT HAVE BEEN REVERSED BY THE BOARD IN THE ABSENCE OF SUBSTANTIAL EVIDENCE SHOWING THE INCORRECTNESS OF HIS DETERMINATION.

On June 25, 1965, a highly emotional Beverly Marsh confronted John Frommelt, the young, hot-tempered son of the store owner, and publicly reproached him for his outburst at her earlier in the afternoon for the shipping mistake. Later that same evening, in the privacy of his office, she gave no explanation why she had walked off the job some twenty minutes or more before the end of her shift. Consequently, she was terminated for being absent from work without permission.

After a reading of the cold record, the National Labor Relations Board concluded that a termination under these circumstances was much out of proportion to the offense charged and could only be explained as a manifestation of hostility toward the only employee who, according to the Board, had disclosed to the Respondent her interest in the benefits which the Union claimed to offer. (R. 58). The Trial Examiner,

who heard the evidence, who could visually appraise the demeanor and credibility of the witnesses appearing before him, and who could logically assess on the spot the thrust of their testimony, did not find the act of termination a pretext to conceal an unlawful motive for discharge. (R. 28).

In the Board's decision and order, three errors were committed. The relationship between Beverly Marsh and the Union and her alleged disclosure of interest in the Union to the Respondent are greatly exaggerated by the Board in terms of what the record actually shows and the impact of the alleged disclosure. Furthermore, the Board arrives at an unsubstantiated conclusion that, because in its opinion the stated cause for discharge was insufficient, the Company must necessarily have intended to discriminate against Mrs. Marsh by discharge because she was a "revealed adherent" of the Union. Finally, the Board is in error by disregarding the determinations of credibility of witnesses made by the Trial Examiner in deciding what the real motivation for the discharge was.

I.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT BEVERLY MARSH WAS DISCHARGED BY JOHN FROMMELT BECAUSE SHE WAS A REVEALED UNION ADHERENT.

If John Frommelt discharged Beverly Marsh because she was a Union adherent, he must be shown

to have known of her Union interest and activities and to have acted upon that knowledge. *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883, 884 (C.A. 1).

Nowhere in the record has the General Counsel proved that this was the case.

Beverly Marsh signed a Union pledge card on April 13, 1965, but there is no evidence in the record or allegation therein that John Frommelt knew this fact before the trial date of this proceeding, February 8, 1966. (Tr. 36).

When John Frommelt met individually with Mrs. Marsh in the coffee shop of Store No. 2, he did not infer or assume she was a Union member or interested in the Union. Quite to the contrary, he treated her as a knowledgeable employee who was aware of Union activity occurring a few years before and whose continued loyalty to the Company, as distinguished from the Union, would be appreciated. (R. 16; Tr. 37). Using Mrs. Marsh's recollection of this meeting as the uncontroverted basis for conclusions, there is no evidence of improper or coercive statements by John Frommelt, and no evidence Mrs. Marsh volunteered any information about the Union or any connection she may have had with such an organization.

Therefore, the episode involving the Union leaflet must be the straw at which the Board is grasping to

reveal Mrs. Marsh as an aggressive, militant adherent of the Union, one whom the Company would apparently on the basis of such incident keep in mind for some two months thereafter to discharge at the first opportunity. According to Mrs. Marsh, she brought the leaflet to work on or around May 4, 1965 to discuss the benefits with the Frommelts. In fact, she did discuss the benefits with Bob, at first in a joking manner and then more seriously, but never in angry conversation. (Tr. 63). It is significant that Beverly Marsh's discussion was an entirely personal one with reference to her own wage scale, health benefits and vacation. All that can be drawn from the discussion is that Mrs. Marsh would personally have liked to have had certain improvements in benefits, but at no time did she refer to Union organization, her membership or interest in the Union, or use of the Union as a vehicle for obtaining her objectives. (Tr. 47). Bob Frommelt recalls concluding the discussion with a wishful statement that he would be happy to get three weeks' vacation himself. (Tr. 391). Although the benefits outlined in the leaflet were subsequently discussed by the Frommelts in the interest of being defensible in the community with respect to wages and conditions, Bob Frommelt regarded the discussion with Mrs. Marsh so lightly that he did not even report it to his brother, John. (Tr. 392). Attempts to show that the Frommelt brothers became extremely cool and heaped work on Mrs. Marsh following the above-

described episode appear painfully contrived to the extent that the Trial Examiner merely repeats the charges without giving them weight. (R. 23, 24). References above in the Statement of the Case to conflicting testimony with respect to coolness toward Mrs. Marsh, picking on her, eliminating the "wild drawer," and assigning excise tax work, demonstrate on their face how unconvincingly the allegations were supported and why the Trial Examiner was justified in giving them little or no weight.

What does impress the Trial Examiner is the lapse of time between the incident of the leaflet on May 4, 1965 and Beverly Marsh's discharge on June 25, 1965. The most the Trial Examiner can draw from the facts is that Mrs. Marsh did manifest an interest in the level of Union benefits to Robert Frommelt on May 4, 1965, but he is unable to substantiate from the record any causal connection between that isolated incident and John Frommelt's intemperate behavior toward Mrs. Marsh two months later. There is no evidence in the record that following May 4, 1965, Mrs. Marsh engaged in any further discussion of benefits, that the Union continued its organization efforts, or that Mrs. Marsh was identified with the Union cause. To impute to John Frommelt knowledge of a discussion of Union benefits between Mrs. Marsh and his brother and as a consequence thereof to assume John Frommelt regarded Mrs. Marsh as a

revealed Union adherent whom he would have to find a pretext to discharge does violence to the burden of proof which the Board must sustain by substantial evidence. Consequently the Board cannot support its finding on mere suspicion, for it is clear from case law that an allegation that the discharge of an employee was motivated by Union activity must be based upon evidence, direct or circumstantial. *Osceola Co. Co-op. Cream. Assn.* v. *NLRB*, 251 F. 2d 62, 69 (C.A. 8); *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 491 (C.A. 8); *Schwob Manufacturing Co.* v. *NLRB*, 297 F. 2d 864, 867 (C.A. 5); *NLRB* v. *Western Bank & Office Supply Co.*, 283 F. 2d 603, 606 (C.A. 10). Nor does an employer's general hostility to Unions, without other support, supply an unlawful motive to a specific discharge. *NLRB* v. *Atlanta Coca-Cola Bottling Company*, 293 F. 300, 304 (C.A. 5), rehearing denied, 296 F. 2d 896; *Ore-Ida Potato Products, Inc.* v. *NLRB*, 284 F. 2d 542, 545-546 (C.A. 9); *NLRB* v. *Redwing Carriers, Inc.*, 284 F. 397, 402 (C.A. 5).

In the absence of proof that the discharge was discriminatorily motivated, the Board must find that John Frommelt terminated Beverly Marsh for the reason he stated.

II.

THE EVIDENCE DOES NOT SUPPORT A FINDING THAT THE TERMINATION OF BEVERLY MARSH FOR BEING ABSENT WITHOUT PERMISSION WAS A PRETEXT TO CONCEAL AN UNLAWFUL MOTIVE FOR THE DISCHARGE.

The Trial Examiner found that John Frommelt discharged Beverly Marsh because she was absent without permission and without explanation. (R. 28). To reverse this finding, the Board must prove with substantial evidence that Mrs. Marsh was terminated for discriminatory reasons and not for the reason given. And the burden of proving an improper motive for discharge is upon the Board. *NLRB* v. *Montgomery Ward & Co.*, 157 F. 2d 486, 491 (C.A. 8); *Ore-Ida Potato Products, Inc.* v. *NLRB*, 284 F. 2d 542, 545-546 (C.A. 9).

According to the Trial Examiner, he took into account the lapse of time between the leaflet discussion and the events of June 25, 1965. (R. 28). On that date, he found that John Frommelt was genuinely angry when he scolded Mrs. Marsh for her shipping error, but significantly John Frommelt did not terminate her on the spot. Had he been lying in wait for a pretext to discharge Mrs. Marsh, this would have been his opportunity. Actually, it was Mrs. Marsh who later provoked her termination by seeking out John Frommelt to reproach him for the manner in which he publicly criticized her. When asked for an explana-

tion of her absence from the store following this incident, she was silent. Whether the sanction of discharge under these circumstances was too severe for the offense is not for the Board to decide unless discrimination is involved.

The Board must prove that the Company violated Section 8(a) (3) of the Act by discriminatory discharge having as its object encouraging or discouraging membership in a labor organization. In construing this Section of the Act, the United States Supreme Court said:

> "The language of Section 8(a) (3) is not ambiguous. The unfair practice is for an employer to encourage or discourage membership by means of discrimination. This section does not outlaw the encouragement or discouragement of membership in labor organizations; only such as is accomplished by discrimination is prohibited. Nor does this section outlaw discrimination in employment as such; only such discrimination as encourages or discourages membership in a labor organization is proscribed." (*Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 42-43)

Cases arising under Section 8(a) (3) are clear that the discharge of an employee, with or without reason, is not substantial evidence of intent to affect labor unions or to affect the rights of employees under the Act. *NLRB* v. *Citizen-News Co.*, 134 F. 2d 970,

973 (C.A. 9). Indeed an employer may hire and discharge at will so long as his action is not based on opposition to union activities. *Farmers Co-Operative Co.* v. *NLRB*, 208 F. 2d 296, 303-304 (C.A. 9); *NLRB* v. *United Parcel Service, Inc.*, 317 F. 2d 912, 914 (C.A. 1); *NLRB* v. *Local 294, International Brotherhood of Teamsters, Etc.*, 317 F. 2d 746, 749 (C.A. 2).

As to the sufficiency of the cause for discharge, "The Board does not dispute the contention that an employee may be discharged by the employer for a good reason, a poor reason, or no reason at all, so long as the terms of the statute are not violated." *NLRB* v. *Condenser Corporation*, 128 F. 2d 67, 75 (C.A. 3).

Thus, if John Frommelt discharged Beverly Marsh for a trivial occurrence in the heat of anger, it is not a discriminatory discharge unless it is proved (not assumed) that the employer knew the employee was engaged in protected activity and actually effected the discharge for that reason. *NLRB* v. *Whitin Machine Works*, 204 F. 2d 883, 884 (C.A. 1).

Reference is made to conduct of the Company, more than two months before the discharge, which the Trial Examiner found was a violation of 8(a) (1). No cross exceptions to these findings were entered because the manner in which the interviews were

conducted in itself may well have run afoul of the Act, and disputing what was said in the individual interrogations would have been a useless exercise. However, violation of one section of the Act does not in any way prove violation of another section. A case in point, although much more extreme, is *NLRB* v. *South Rambler Co.*, 324 F. 2d 447, 449-450 (C.A. 8). There an employer violated the Act by interrogating his employees as to their Union activities, threatening that his automobile agency would be closed down and discharging an employee for initiating the drive to unionize the agency. The Court held that the Board must have substantial supporting evidence that the discharge of another employee was also illegal where the sole Union activity of the other employee was signing a Union pledge card. Consequently the Board's order requiring reinstatement of the employees could not be enforced because the inference drawn by the Board to the effect that the employee's discharge was motivated by his Union activity was based upon mere suspicion.

In the instant case, the Board's finding that because the penalty of discharge was much out of proportion to Mrs. Marsh's offense and could only be explained by reason of her manifested interest in Union benefits is mere conjecture based on suspicion. No evidence, direct or circumstantial, supports such a conclusion.

III.

THE EVIDENCE RELIED UPON BY THE TRIAL EXAMINER WITH RESPECT TO THE REASON FOR THE DISCHARGE BASED UPON HIS DETERMINATION OF THE CREDIBILITY OF WITNESSES CANNOT BE DISREGARDED BY THE BOARD.

The question of what was in the mind of John Frommelt at the time he terminated Beverly Marsh is crucial to this case. Only through the examination of witnesses including John himself and the surrounding circumstances can the question of motivation be determined. And where there is a conflict of testimony, someone must resolve the matter of who is to be believed, preferably someone who can observe, hear, appraise and evaluate firsthand those who testify.

Courts of law have established the general rule that the jury or trial judge sitting without a jury are the exclusive judges of the credibility of witnesses and the weight of the evidence. It is respectfully submitted that the general rule in Board practice is the same and that the Trial Examiner sits as the exclusive judge of the matter of credibility. The duty to pass upon the weight of the evidence and to determine the credibility of witnesses rests upon the Trial Examiner and when disagreement arises between the Board and the Examiner, the reviewing Court may not disregard the superior advantages enjoyed by the Trial Examiner for determining the witnesses' credibility. *NLRB* v. *Hamilton Plastic Molding Co.*, 312 F. 2d 723, 727

(C.A. 6). Where the Trial Examiner finds the testimony of a witnesses truthful and there is nothing to render the testimony improbable or incredible, the finding of the Trial Examiner should not be disregarded by the Board. In fact, contradictory findings of the Board will be set aside on judicial review. *NLRB* v. *Universal Camera Corp.*, 190 F. 2d 429, 431 (C.A. 2). Where conflicts arise in unfair labor practice decisions, the judgment of the Trial Examiner as to which witnesses are telling the truth is rarely subject to reversal. *Sardis Luggage Co.* v. *NLRB*, 234 F. 2d 190, 194 (C.A. 5). As the United States Supreme Court said in *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 495: "Nothing in the statute suggests the Labor Board should not be influenced by the Examiner's opportunity to observe the witnesses he hears and sees and the Board does not."

The critical determination of credibility which the Trial Examiner made in the instant case is his acceptance of John Frommelt's statement that unauthorized absence was the actual reason for the discharge of Beverly Marsh. (R. 28). In support of this determination, he gives no credence to testimony, offered to prove other motivation for the discharge, that the Frommelt brothers turned unfriendly to Mrs. Marsh after the leaflet incident, constantly picked on her, loaded her with work and went out of their way to increase the burden of her work. (R. 26, 27). What he finds is a

period between May 4, 1965 and June 25, 1965 in which nothing bearing on the discharge of Beverly Marsh took place. On the basis of live testimony which he has seen and heard, with an opportunity to observe and question the witnesses, he warns against reaching beyond the evidence for opinions and conclusions which cannot be supported. (R. 27).

Where Board findings have conflicted with those of the Trial Examiner, the reviewing Court has set them aside where the Board could not make such determinations without discrediting a witness who was credited by the Trial Examiner. *Boeing Airplane* Co. v. *NLRB*, 217 F. 2d 369, 375-376 (C.A. 9); *NLRB* v. *Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366, 369 (C.A. 9). Short of a showing by substantial evidence that the Trial Examiner was incorrect, the Board cannot reverse his finding, based upon a determination of credibility of testimony, that John Frommelt was in a genuine rage and discharged Beverly Marsh for the reason he stated.

In summary, John Frommelt was found by the Trial Examiner, the trier of fact, to have discharged Beverly Marsh for being absent without permission. That John did so in a fit of anger, for a reason which may not have called for such drastic action, and that she did not offer explanation and seek reconsideration, are matters beyond the purview of the Board's

authority to consider. In the absence of proof of unlawful motive, the Board may not substitute its judgment as to the sufficiency of the cause for discharge for that of the employer. *NLRB* v. *Wagner Iron Works*, 220 F. 2d 126, 133 (C.A. 7).

CONCLUSION.

For the reasons herein stated, it is respectfully submitted that the petition for enforcement of that portion of the Board's decision and order which finds the Respondent has violated Section 8(a) (3) of the Act and orders the reinstatement of Beverly Marsh should be denied.

Dated: January 16, 1968, at Berkeley, California.

Respectfully submitted,

CORBETT & WELDEN

By LAURENCE P. CORBETT
JACQUES R. WELDEN
EDWARD G. SCHOLTZ

Attorneys for Respondent

CERTIFICATE.

The undersigned certifies that he has examined the provision of Rules 18, 19 and 39 of this Court and, in his opinion, the tendered brief conforms to all requirements.

CORBETT & WELDEN
LAURENCE P. CORBETT

Attorneys for Respondent

APPENDIX

APPENDIX A

This appendix is prepared pursuant to Rule 18(f) of the Rules of this Court, References are to pages of the original transcript of record.

GENERAL COUNSEL'S EXHIBITS

No.	Identified	Offered	Received in Evidence
1(a) - 1(f)	6	5	6
2	8	8	8
3	14	14	14
4	35	35	35
5(a) - 5(c)	149	148	149
6	298	298	298
7	434	434	434

RESPONDENT'S EXHIBITS

1	256	256	256
2	299	302	303

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22260

RICHARD WALTER BURTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

FILED
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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22260

RICHARD WALTER BURTON,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment rendered by the United States District Court for the Central District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to perform

work assignment, as ordered), Universal Military Training and Service Act [Tr. 24].[1]

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 25].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to perform a work assignment, as ordered [Tr. 2].

Appellant pleaded "not guilty" and was tried by the Honorable W. J. Ferguson, District Judge, jury trial having been waived. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 24].

A written motion for judgment of acquittal was filed during the trial [Tr. 20].

FACTS

The facts are found in two places:

(1) The complete Selective Service System file (the government's exhibit) and

(2) The oral testimony, and defendant's exhibits (two photos).

1. Tr. refers to the Transcript of Record.

The essential parts of the written evidence shows:

On December 20, 1964, appellant filed his Classification Questionnaire (SSS Form No. 100) and answered all applicable portions. [Ex.* 4-12].

On October 21, 1965 he filed his Special Form for Conscientious Objection (SSS Form No. 150). [Ex. 18-23].

Although he was thereafter initially classified in Class I-A he was given the Class I-O classification he desired, at the time he met with the local board. [Ex. 11].

On May 19, 1966, he was mailed the form (SSS Form No. 152) that asks registrants so classified to nominate three types of civilian work that contribute to the national health, safety or interest that they feel best qualified to do. [Ex. 44].

He timely replied by filling in "SERIES II—APPLICATION FOR APPROVED EMPLOYMENT—If you have applied to an approved employer for civilian work contributing to the national health, safety, or interest, and he has accepted your application, indicate" as follows:

"Name of Employer—City of Los Angeles, Recreation Parks Dept. (Civil Service)

Address of Employer—Griffith Park zoo, L. A.
(Number & Street (City)

California
(State)

Type of Employment—Animal Keeper

*Ex. refers to the government's exhibit, the complete Selective Service System file of the appellant.

Remarks—As a civil service employee, I have a six month probation period to go through two of which are finished.

Richard W. Burton
(Signature of Registrant)"
[Ex. 44]

The local board's only reaction was to send the file to State Headquarters, asking, by its routine letter, for three types of work to submit to the registrant [Ex. 49].

Therefore, despite the many explanations by appellant of the valuable nature of his work, he was ordered to work in the Los Angeles County General Hospital and he refused. Prosecution followed.

At the trial the implicit suitability of his work choice was explicitly shown. This will be detailed in Argument, below.

QUESTION PRESENTED AND HOW RAISED

I

Was the rejection of appellant's choice of work arbitrary, unfair, and a denial of due process? This question was raised by the Motion of Judgment of Acquittal (CT 20-21).*

SPECIFICATION OF ERROR

I

The district court erred in failing to grant the Motion for Judgment of Acquittal.

*CT refers to the Clerk's Transcript of Record.

SUMMARY OF ARGUMENT

I

The Order to Report Was Invalid and No Conviction May Be Based On It, for each of the following reasons:

The local board deprived defendant of his elected civil work choice, contrary to law.

The order was based on an illegal abdication of its duty and responsibility by the local board, its order being an act based on a direction that usurped the authority of the local board and illegally controlled it.

The regulations, as interpreted and applied, conflict with the Act.

The Act, as construed and applied by the regulations, the local board and the State Director is unconstitutional because it deprives the defendant of due process of law contrary to the Fifth Amendment to the United States Constitution.

ARGUMENT

The Order to Report Was Invalid and No Conviction May Be Based on It.

It is clear that this appellant wanted to do civilian work contributing to the national interest, at all times.

It is also clear that he actually was in such work. Further, that all work done by him at all times thereafter, and currently, is work that he believed should be considered a contribution to the national interest, as distinguished from essentially money-making work.

The questions here are—

(1) Since the law gives the I-O registrant the option to initiate a request for assignment to three work choices of his selection must he choose only from those on an "approved" list, moreover an inflexible list compiled by the State Director?

(2) After the registrant responds to an invitation by his local board to initiate such a request may his choices be rejected with no more explanation than "it is not on the State Director's list"?

The statute* in essential part reads:

"(j) Conscientious objectors . . . shall . . . be ordered . . . to perform . . . such civilian work contributing to the maintenance of the national health, safety, *or interest as the local board may deem appropriate* and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title." (Emphasis supplied)

The applicable regulations (32 C.F.R. §§ 1660.1 *et seq.*) in essential parts read:

"1660.1 Definition of Appropriate Civilian Work.—(a) The types of employment which may be considered under the provisions of section 6 (j) of title I of the Universal Military Training and Service Act, as amended, to be civilian work contributing to the maintenance of the national health, safety, or interest, and appropriate to be performed in lieu of induction into

*UMT & S Act of 1951, as amended, §6(j), 50 USCA App. §456(j).

the armed forces by registrants who have been classified in Class I-O shall be limited to the following:

(1) Employment by the United States Government, or by a State, Territory or possession of the United States or by a political subdivision thereof, or by the District of Columbia.

* * *

(b) Except as provided in subparagraph (2) of paragraph (a) of this section, work in private employment shall not be considered to be appropriate civilian work to be performed in lieu of induction into the armed forces by registrants who have been classified in Class I-O."

Nowhere is there a specification that this work must be approved by the State Director or that he is to have an "approved" list. Congress and the President have made their intentions clear.

Appellant, by his own evidence, and by that of several zoo officials showed the nature of his work and of its value to the national interest.

An analysis of this evidence shows:

1. The testimony of Charles J. Sedgewick: "A. I am a Doctor of Veterinary Medicine. I am the clinician for the Los Angeles Zoo animals." [RT 27].* His work dealt with using macaque blood for human transfusions [RT 28] in connection with the Children's Hospital [RT 29]. "Mr. Burton is a highly qualified primate animal keeper and he makes it possible for me to have healthy animals so that this program could be taken care of" [RT 29] and "it requires great skills and certain innate capabilities, and

*RT refers to the Reporter's Transcript.

persons with Mr. Burton's background and capabilities are rather rare. We have a few working at the zoo in addition to Mr. Burton, but his skills are very worthwhile and desirable." [RT 30].

He further testified:

"There is another research activity that we just recently received which I understand is some federal grant money involved, anesthesia in all classes of animals.

Q. That is in connection with the pictures that we exhibited—

A. Yes.

Q. —A and B?

A. Yes.

Q. And is the defendant, Mr. Burton, a part of that work?

A. Yes. It is very necessary to have an experienced man, animal handler, because an animal, a very excited animal or an animal that is unduly stressed prior to innoculation will not give you the proper response. It is very important that the animals have the appropriate handler." [RT 33-34].

2. The testimony of Edward Alonso, Principal Keeper:

". . . he is an excellent employee. He handles himself quite well with the public." [RT 41].

* * *

"It is difficult really to find anyone that really is serious about one particular type of animals. Most of the people get a little bit tired of what they are doing and would prefer to transfer from one place to another. It is difficult to find a man that is extremely interested in one particular area. And not that this is just his sole—

Q. Do you mean that he is interested extremely in what he is doing now?

A. Yes. In animals generally, I am sure, but particularly in primates. He indicated this to me.

As an example, I tried to encourage him to take the last senior exam, due to the fact that he is not only qualified but he was also eligible due to the fact that he has some college experience.

And he wouldn't take it, the primary reason I think was because he indicated he would prefer to stay where he is. The promotion would mean that he would have to move to other areas, move over to another string

So this indicates to me that he wants to stay in the the area he is in, which is mainly dealing with primates. Some of the others are Asiatic and African mammals but primarily primates." [RT 43].

* * *

"I have examined the records—I do go by them daily. Richard on his own has taken a very active part in this and active to the extent that he has brought out things that—at least pointed out things to myself and to his direct superior, things that unfortunately neither he nor I were familiar with. His records are quite extensive, not only extensive but extremely good. I think they will be of great benefit to the zoo some day, and are at this present time." [RT 45].

4. Defendant testified he had examined the "approved lists" of the 56 (not 1956, as the reporter's transcript has it) State Directors and that some of them listed work with animals [Rep. Tr. 17].

On cross-examination it appeared (by arithmetic) that except for school and part-time furniture moving that all of his adult life was in work with animals [Rep. Tr. 20].

The above oral evidence from the four witnesses is what distinguishes this case from *Mang* v. *United States,* 9 Cir., 1964, 339 F.2d 369. In Mang the appellant delayed employment, although initially starting in satisfactory civilian work, "over sixteen months after he had quit" [370] and Mang did not present explicit evidence for the record that his work [with the Quakers] met the statutory requirements. Appellant Burton actually was established (as a probationer) in work, civilian work that met the statutory requirements.

The Act and the regulations place the responsibility for work selection on the local board. This responsibility must be met reasonably and fairly.

The local board may not arbitrarily reject the registrant's work choices, it must give a rational reason for its conduct, it must "build a record." *Dickinson* v. *United States,* 346 U.S. 389 (1953). [74 S. Ct. at 159].

The local board may seek information or advice from any source, and information or advice may be given to it by anyone.

The record however, shows an abdication of its prerogative and a shirking of its plain duty by the local board; also, and even less excusable, a usurpation of prerogative by the State Director.

"Outside influence" may be valuable, it may be harmless, or it may be considered binding. We contend this was so in this instance. "Binding" outside influence has been held to invalidate the "decision" of local boards in a number of different kinds of studies. Some instances are the following:

In *Talcott* v. *Reed,* 9 Cir., 1954, 217 F.2d 363, it appeared there had been interference with board action by Gen. Hershey's Operation Bulletin No. 57. The Director's action was disapproved:

> "We think the contents of the Bulletin are morally and legally wrong. It invades the most sacred precinct of family life at a time when there should be the most complete mutuality between the spouses and in the face of nature's most demanding and significant urge in nature's scheme for propagating the species. It obliquely charges the youth of the land with corrupting the family relation into a way of avoiding service for cowards." [363]

In *Tietz* v. *Gen. Abbott,* 1946, N.D. Calif. 66 F. Supp. 765, the use by the local board of the ". . . inadequate report of the [farm] Investigator . . ." was held to be basis for granting a writ of habeas corpus. [766]

In *Ex Parte Barrial,* 1951, S.D. Calif., 101 F. Supp. 348, a writ of habeas corpus (against the Marine Corps) was issued because there had been an invalid resolution by the local board, one ". . . contrary to Selective Service Regulation 1622.15 (a) (1) . . ." [349]. Although the opinion does not show why the board so rashly acted we represent to the Court that the record showed conclusively it was because of the State Director's SHQ #14 (a bulletin) that "informed" the boards they could disregard marriages contracted after the crossing of the 34th Parallel by North Korean troops.

In *Ashauer* v. *U. S.,* 9 Cir., 1954, 217 F.2d 788, one of the principal questions was whether the board was unduly influenced by the Department of Justice. This Court laid

down the rule to be followed, stating: ". . . there is nothing in the case which compels us to conclude that the board surrendered its right to reach its own judgment. . ." [791] The record in this appeal cannot meet this test.

In *U.S.A.* v. *Avery*, No. 27550(2), Eastern District of Missouri, November 27, 1953, we quote more lengthily because it is an unreported decision:

> "Defendant is entitled to the independent judgment of the local board in making his classification. We do not understand the local board is without power to classify a conscientious objector and that such classification can only result from the Attorney General's opinion. Yet defendant's Exhibit B carries with it this implication. If the defendant's classification as I-A on June 8, 1952, was in response to the letters from the Legal Officer of the State Headquarters and the Chairman, the defendant was deprived of a substantial right, namely the independent judgment on his classification by the local board."
>
> * * *
>
> "We are unwilling to base a conviction on presumptions and inferences in the face of testimony to the contrary. Therefore we are not convinced of the guilt of the defendant beyond a reasonable doubt.
>
> "Questions upon which we have a reasonable doubt are:
>
> (1) Was the act of the local board in putting the defendant in classification I-A in fact the act of the local board and not the result of acts of the State Selective Service office through the local board's misinterpretation of the meaning of defendant's exhibits B and C; and

(2) Was all of the information given to the local board orally at the August 12, 1952, hearing, substantially incorporated in written documents in the defendant's file and therefore no summary necessary?

"Our disposition of this case means the Government must start with its local board and proceed with the classification of this defendant as provided by the regulations, and conform to the regulations in every respect necessary to protect the substantial rights of the defendant in classifying him under the Selective Service System.

"ORDER

"The defendant is discharged.

/s/ Rubey M. Hulen
Judge"

In *Ex Parte Asit Ranjan Ghosh*, S.D. Calif., 1944, 58 F. Supp. 851, we have an excellent discussion of these State Director's directives by a district judge who had been a Selective Service official, the most thorough discussion of this subject known to counsel. In *Ghosh* a writ was granted, the court observing "And the State Director is not empowered under the Act to promulgate rules or regulations nor to substitute his judgment for that of the local or appeal boards." [857]

In *Levy* v. *Cain*, 2 Cir., 1945, 145 F.2d 339, the Court reversed an order where a writ had been denied. It appeared the local board had made use of a report by a panel of experts. The opinion, by Judge Learned Hand held that such use must be a restricted one, that ". . . they must not be made a substitute for the boards themselves." [341]

The Court concluded that the form of the recommendation made it improper for the board to act upon it; that ". . . it was a decision upon the very issue to be decided." [941]

The problem in our case seems akin to that decided by the court in *Glover* v. *U.S.A.*, 8th Cir., 1961, 286 F.2d 84. Glover had complained he had been reclassified ". . . by the reason of an unpublished directive to the local board from State Headquarters, the context of which was not generally circulated or made known. This directive, in turn, was based upon advice and recommendations contained in Operations Bulletin No. 123, as amended, from National Headquarters to State Headquarters. Said Bulletin was also unpublished, and was an interdepartmental communication publicly unobtainable." [89-90]

The court held "The maintenance of fair procedures is essential to the administration of justice. According to Congressional declaration (62 Stat. 605, 50 U.S.C.A., Appendix, § 415(c)), the overall operations of the Act and regulations pertinent thereto were designed to be fair and just. Under the circumstances here existing, the failure on the part of the local board to convey to defendant any reason or explanation for the repetitious fifth classification of I-A was contrary to our concept of fairness and basic justice." [90]

We believe the failure of Burton's local board to itself consider the merits of his work choices is contrary to the statute, the regulations, and to basic justice.

In *Eagles* v. *Samuels*, 67 S.Ct. 313 (1946), our argument by analogy is further supported. There, the Court stated: "It is plain that the local boards and the boards of

appeal may not abdicate their duty by delegating to others the responsibility for making classifications. That is their statutory function. Section 10(a) (2)." [319]

In *Eagles,* however, the Court decided that the city director [The New York City Director is the equivalent of a State Director] had ". . . submitted the panel's report *with* the admonition that it was advisory only *and that it was the board's responsibility* to make the classification. The recommendation of the panel was followed. But Samuels was subsequently given not only one but two hearings before the local board and a hearing before the board of appeal. *There is no indication either board relied solely on the panel's report or considered itself bound by it.* In fact both boards received additional evidence submitted by Samuels and considered it. The record does not bear out the suggestion that either board was a rubber stamp for the panel." [319-320] (Emphasis added)

This court, by implication, has already agreed with our argument. In *Tyrrell* v. *U. S.*, 9 Cir., 1952, 200 F.2d 8, the problem of the use of lists was discussed and, in that case this Court concluded:

> "It is clear that the list was issued and used solely as a guide to the draft boards so as to facilitate their consideration of classification problems that might come before them. It was not an inflexible standard." [13]

We believe this conclusion should be reached: Appellant was illegally deprived of consideration of his elected work choice by the local board. Therefore, the order to report on which the conviction is based was not in conformity with the established administrative process.

CONCLUSION

For the reasons given the judgment should be reversed.

Respectfully,

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Attorney for Appellant

February 9, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

.....

J. B. TIETZ, *Attorney*

APPENDIX

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Defendant's Exhibits:		
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B	14	15

NO. 22260

IN THE UNITED STATES COURT OF APPEALS

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RICHARD WALTER BURTON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

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ROBERT L. BROSIO,
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FILED

MAR 14 1968

WM. B. LUCK, CLERK

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NO. 22260

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The Federal Grand Jury for the Central District of California returned Indictment No. 379-(WF)-CD, on March 8, 1967, charging appellant with violation of the Universal Military Training and Service Act, Title 50 App., Section 462, United States Code. On May 16, 1967, the appellant was tried by the court and the case was continued to May 25, 1967. On May 25, 1967, the appellant was found guilty. On June 22, 1967 appellant was sentenced to three years in the custody of the Attorney General, pursuant to Title 18, United States Code, Section 4208(a)(2).

The District Court had jurisdiction to try the case under Title 18, United States Code, Section 3231. This Court has jurisdiction to entertain this appeal pursuant to the provisions of Title 28, United States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 50 App., Section 462, United States Code, provides in part:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

Title 50 App., Section 456(j) states:

"(j) Conscientious objectors. -- Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . . Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in Section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purpose of Section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

III

STATEMENT OF FACTS

The following factual information is abstracted from the appellant's Selective Service File, a photostatic copy of which was received into evidence as Plaintiff's Exhibit No. 1, and from the oral testimony presented at trial. This file, Plaintiff's Exhibit No. 1, is pencil paginated at the bottom of each sheet and is hereinafter referred to by sheet number.

On November 12, 1964, the appellant registered with Local Board No. 117 (hereinafter referred to as "The Board") [p. 1].

On January 14, 1965, appellant was classified II-S. Appellant made no request for a SSS Form 150 (Conscientious Objector's Form) [pp. 7, 11]. On October 21, 1965, The Board received a SSS Form 150 from appellant [pp. 18-23]. The Board reclassified appellant as I-A and so notified him. However, on April 7, 1965, appellant appeared before The Board and a hearing was held concerning appellant's request for a I-O classification [pp. 30-31]. Subsequent to this hearing The Board classified appellant as I-O [p. 11]. Appellant was duly notified of his I-O classification on April 7, 1966.

On May 5, 1966, appellant appeared for a physical examination. On May 12, 1966, appellant was notified that he was acceptable for induction into the Armed Services, or for civilian work in lieu thereof [p. 40].

On May 6, 1966, appellant notified The Board that it was

his intention to serve his required civilian work assignment as an animal keeper for the Los Angeles City Zoo [p. 41].

On May 31, 1966, appellant returned SSS Form 152, "Special Report for Class I-O Registrants", omitting to fill out the portion of the form entitled "Work Qualifications". On this form appellant did apply for his employment as an animal keeper to be approved as satisfying his civilian work assignment [pp. 43, 44]. In addition, appellant submitted a letter stating that he had not checked the list of approved work. Appellant also reiterated his position that he desired to fulfill his obligation by continuing as an animal keeper for the Los Angeles City Zoo [p. 45].

On June 13, 1966, The Board sent a letter to appellant informing him of three employment opportunities which were available and approved. The appellant was requested to designate his preference for the employment specified. Appellant responded to this letter by stating that he did not wish to perform any of the employment offered by The Board [p. 51]. Appellant explained his position by contending that his present employment as an animal keeper in the zoo was the greatest benefit he could perform for the general public [p. 52].

On August 3, 1966, pursuant to the request of The Board, appellant met with Major Miller and The Board for a discussion concerning the type or work available for appellant to satisfy his obligation. At this meeting appellant read the State Director's List of Approved Civilian Work Assignments and claimed that none were acceptable [pp. 59-60]. The Board explained that it was refusing to

accept appellant's request to perform his civilian work assignment at the Los Angeles City Zoo for the reason that it was not on the approved list provided by the State Director [p. 59].

Appellant was ordered to report to the Los Angeles County Department of Charities at 10:00 A. M. on October 5, 1966, for work as an institutional helper [p. 67]. On October 7, appellant informed The Board that he had refused to report for work as ordered by The Board [p. 69]. The Board was also notified by the Personnel Officer, Los Angeles County General Hospital that appellant refused any and all assignments [p. 70].

On March 8, 1967, an indictment was returned by the Grand Jury charging appellant with refusing to perform his civilian work assignment.

At the trial of this case appellant admitted that he had refused to accept any of the offered civilian work assignments, and specifically the work assignment at the Los Angeles County Department of Charities [R. T 26-27]. 1/ Appellant endeavored to show that his work as a primate keeper at the Los Angeles City Zoo was important and was in the public interest. This fact was not contested by appellee in the trial.

1/ R. T. refers to Reporter's Transcript.

IV

QUESTION: SPECIFICATION OF ERROR

Was the order to report for civilian work invalid because it constitutes an abdication by the Local Board of its duly designated function?

ARGUMENT

THE ORDER TO REPORT FOR CIVILIAN WORK WHICH THE APPELLANT DISOBEYED WAS A VALID ORDER AND THE CONVICTION SHOULD BE AFFIRMED.

The specific question now before this Court is that the appellant while appearing to be willing and able to perform civilian work has refused to perform any of the civilian work assignments specified on the State Director's list of approved jobs. The appellant recognizes that employment as a primate keeper is not on the State Director's list of approved jobs and this is the only work that appellant has expressed a willingness to perform. The specific question raised by appellant was recently decided in Mang v. United States, 339 F. 2d 369 (9th Cir. 1964). In that case Mang had taken employment with a Quaker social service organization, known as the Friends Committee on Legislation. This work was not approved by the Local Board and Mang was ordered to report to the Los Angeles County Department of Charities. He refused to so report and his indictment followed shortly thereafter. The contention

presented to the court in Mang, ibid., was identical to the issue now before this Court; i.e., the Local Board relied on the State Director's list of approved organizations, and appellant charges this constitutes an abdication of the Local Board's duties; an illegal usurpation of authority by the State Director; and a denial of due process. The court specifically held, " . . . We find no merit in appellant's position." Id. at 370.

In the Mang case, ibid., the court placed reliance on United States v. Lawson, 337 F. 2d 800 (3rd Cir. 1964). In that case Mr. Lawson refused to accept any employment that was on the approved list prepared by the State Director. Lawson contended that his employment at Goodwill Industries satisfied his obligation. Id. at 805. The Board notified Mr. Lawson that Goodwill Industries was not approved by the State Director for New Jersey, although it was approved in other States. Id. at 806. In that case, Lawson raised precisely the same objection as raised by appellant herein, in that he contended an abdication by the Local Board of its statutory function by utilizing the State Director's list for the selection of proposed employment for a conscientious objector. As the court there stated, " . . . It becomes apparent that the Board, by permitting itself to be guided in the selection of the proposed employer of this conscientious objector, abandoned none of its autonomy with which the Selective Service Act vested it. Indeed, it is difficult to understand how uniformity of treatment of all conscientious objectors with regard to engagement in public welfare work could otherwise be practiced." Id. at 816.

Appellant endeavors to distinguish Mang, supra, and Lawson, supra, on the grounds that in the instant case appellant did present evidence that established the fact that employment as a primate keeper was in the public interest. As the court in both Mang, supra, and Lawson, supra, recognized, it was immaterial that the work chosen was in the public interest, the crucial factor was that it was not on the State Director's list of approved places of employment. The court found that the local board had not abdicated any of its vested autonomy in being guided by the State Director's list of approved places of employment. It can hardly be doubted that employment with Goodwill Industries was in the public interest, but yet it was not acceptable in New Jersey, and therefore Lawson could not satisfy his obligation by working for the Goodwill Industries. Id. at 806. The crucial point overlooked by appellant is that The Board can rely on the State Director's List of Approved Employment.

Appellant's argument is defective because of the emphasis placed upon classification cases to support the proposition submitted in the present case. The question of classification is particularly local in nature, because classification is an individual subject best determined by the local board that has direct dealings with a registrant. Once a registrant is classified the situation is altogether different. While the regulations do provide for the local board to play an important role in determining as I-O civilian work assignment, the final approval for the order to perform civilian work is placed in the hands of the National Director of Selective Service.

Title 32, Code of Fed. Reg., Section 1660.20(d). The National Director has delegated to the State Director the authority to prepare lists of approved institutions and agencies for civilian work assignments.

In the present case The Board relied upon the State Director's list in rejecting appellant's request to perform his civilian employment obligation as a primate keeper for the Los Angeles City Zoo. 2/ In both Mang, supra, and Lawson, supra, the local boards rejected the registrant's request for the identical reason. Appellant was well aware of the fact that his job as a primate keeper was not on the list of approved employment [R. T. 23-24]. There does not exist any meaningful allegation, argument or fact that distinguishes the present case from the aforementioned precedents supporting The Board's ruling on appellant's case.

2/ In this respect it may be noted that appellant was earning approximately $500 per month as an animal keeper [R. T. 19], whereas, as an institutional helper the pay was approximately $240 per month [p. 51]. For this reason, among others, the regulations indicate an intent that an individual performing civilian employment in lieu of military service not be allowed to satisfy his obligation by continuing in his regular civilian employment. 32 Code Fed. Reg. Section 1660.21(a).

CONCLUSION

For the reasons cited in the case of Mang v. United States, 339 F. 2d 369 (9th Cir. 1964), and the reasons above mentioned in argument, appellee respectfully submits that the conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Dennis E. Kinnaird
DENNIS E. KINNAIRD

IN THE

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No. 22261

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Appellee.

APPELLANT'S OPENING BRIEF

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF

JURISDICTION

This is an appeal from a judgment by the United States District Court for the Central District of California.

The appellant was sentenced to the custody of the Attorney General for a period of three years after a one count conviction for violation of Title 50, United States Code App., Section 462 (knowingly fail and refuse to be inducted into the Armed Forces of the United States), Universal Military Training and Service Act [Tr. 4].[1]

1. Tr. refers to the Transcript of Record.

Title 18, United States Code, Section 3231, conferred jurisdiction in the District Court over the prosecution of this case. The United States Court of Appeals for the Ninth Circuit has jurisdiction of this appeal under Rule 37 (A) (1) and (2) of the Federal Rules of Criminal Procedure. Notice of Appeal was filed in the time and manner required by law [Tr. 5].

STATEMENT OF THE CASE

The indictment charged appellant with a violation of the Universal Military Training and Service Act for refusing to submit to induction [Tr. 2].

Appellant pleaded not guilty and was tried by the Honorable Irving Hill, District Judge, sitting alone without a jury. Appellant was found guilty and sentenced to imprisonment for a period of three years [Tr. 4].

FACTS

The relevant facts in this appeal are found in (1) the Selective Service file [Ex. 1-154]* and in (2) the reporter's transcript of the trial [RT 1-1-4],** both being parts of the designated record on appeal.

1. Appellant claimed he had a disqualifying physical defect, to wit: one leg one-half inch shorter than the other [RT 21/16] by reason of an "old fractured right tibia." [RT 42/13-80/8, Ex. 108].

*Ex. refers to the government Exhibit #1, the complete SSS file of appellant.

**RT refers to the reporter's transcript.

The appellant had sent his local board a letter from his doctor (Ascher) which showed, by measurement, that his legs had a half-inch discrepancy in length [Ex. 133].

It was stipulated that this would be the sworn testimony of Dr. Ascher, if put on the witness stand [RT 28/3].

The senior army medical officer at the Armed Forces Examining Station in Los Angeles [RT 30/24] testified that ". . . there is nothing in the record that indicates we actually measured [the legs] . . ." [RT 54/21].

This doctor testified that the standards governing acceptability are in AR 40-51, Chapter 2, Change 15: ". . . would be that an extremity which is one-half inch shorter than the other, if it produces gross lameness or—I am groping for the word they use—limping, is disqualifying." [RT 53/5].

Appellant testified that his injured leg prevented him holding ". . . down my regular type of position from my inability to move objects . . ." [RT 84/24]; "I can't walk for long lengths of time" [RT 85/15].

The army doctor could only guess [RT 56/22] that there was no gross limping and that he had no reason to doubt Dr. Ascher's measurements [RT 56/9].

When finally asked ". . . why he was not acceptable in August of 1965 and why he is acceptable in July of 1966, based upon the criteria that you have already explained to us." [RT 59/18], he could not give an evaluation [RT 60/5].

2. Appellant claimed his mother was dependent on him.

On December 13, 1963, he answered a questionnaire (SSS Form No. 118) showing his mother was dependent on him. He was classified in Class III-A on January 8, 1964 [Ex. 13 and 63].

When he had a leg fractured in 5 places [Ex. 108] and so notified the board, in a letter they received February 8, 1965 [Ex. 64] an entry in the Minutes of Action was made on the same date "He had an accident, not work, therefore unable to support anyone" and another entry was made on March 2, 1965 showing the board voted to reclassify him in Class I-A [Ex. 13].

However, when evidence of his mother's dependency on him was presented on June 22, 1966 [Ex. 123] and on July 2, 1966 [Ex. 126] a refusal to "reopen" letter was sent, by the clerk [Ex. 128] with the notation in the Minutes of Action "Bd. members contacted—Postponement Denied." [Ex. 15].

QUESTIONS PRESENTED AND HOW RAISED

I

Was there a basis in fact for denying appellant a deferred classification? This question was raised by the presentation in evidence of the entire Selective Service System file, and the oral evidence during the trial, and the dialog between court and counsel.

II

Was there a denial of due process in the failure of the local board to reopen the classification, when, in June and July, 1966 facts not "considered" when he was classified

in Class I-A, facts which if true required classification? This question was raised by the above mentioned exhibit of the government.

SPECIFICATION OF ERRORS

I

The district court erred in convicting the defendant and entering a judgment of guilty against him.

SUMMARY OF ARGUMENT

1. Appellant presented a prima facie case for a IV-F (physically unfit) classification.

The evidence in the record does not rebut it.

Appellant presented a prima facie case for a III-A (dependency) classification.

There was no evidence to rebut it.

In any event his request for a reopening of his classification was mishandled and he was illegally deprived of his administrative opportunities for relief, namely, an Appearance Before Local Board and an appeal.

ARGUMENT

I

There Was No Basis-in-Fact for Denying the Registrant a Deferred Classification.

Appellant made two claims that were ignored: one for a physical unacceptability classification and one for a hardship classification. Why they were ignored will be discussed below, in "B", "A" being devoted to the prima facie quality of these two claims.

A. His prima facie claims.

1. In our FACTS, above, we recited the details of appellant's showing concerning his physical unacceptability. These made out a prima facie case.

2. In our FACTS, above, we referred to the details concerning his revived dependency situation and the evidence in support. Here, too, he made out a prima facie deferred classification showing.

It would appear, therefore, that he was entitled either to one of such classifications or to have his claims and evidence handled by the local board according to another of the regulations, that is, the one that (1) gives the local board the right to form an initial, adverse judgment but that (2) preserves the right of the registrant to his subsequent administrative remedies, 32 C.F.R. § 1625.2.

B. When and how they were ignored.

We can sympathize with the local board in the long and burdensome processing required by this registrant. However, none of the lengthy processing was due to any stalling, evasion or just plain stubbornness on his part.

Therefore, there was no legal excuse for the board ignoring the applicable law. That all are required to know that the law applies with even more force to officialdom and, especially, to a body dealing with very young men.

The board had once given him a III-A classification, on the dependency of his mother. We do not contend he had a vested right in a III-A, forever. However, assuming, (but not conceding) that the board was justified in ratifying

the 1965 conclusion of its clerk [we refer to the entry in the Minutes of Action, under date of February 8, 1965, that he "Had an accident, not working, therefore unable to support anyone," Ex. 13] at its next meeting, what rationale is there for its subsequent, 1966 conduct, when his leg had healed to the extent that he could again work and his mother again showed her needy condition? This was in both June and July of 1966.

No reason was given this time. There was no basis in fact for it.

II

The Local Board Illegally Failed to Reopen His Classification.

There are two further reasons to consider the conduct of this agency illegal.

A. Its regulations *require* a consideration by the board.

The presumption of official regularity (that this was done) is overcome by its own records.

First, the regulations, 32 C.F.R. § 1604.56:

1604.56 Organization and Meeting.—Each local board shall elect a chairman and a secretary. A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification. Every member present, unless disqualified, shall vote on every question or classification. In case of a tie vote on any question or

classification, the board shall postpone action on the question or classification until it can be decided by a majority vote. If any member is absent so long as to hamper the work of the local board, the chairman of the local board shall recommend to the State Director of Selective Service that such member be removed and a new member appointed.

Next, the record. The Minutes of Action of the Local Board, on page 15 of the Exhibit recites: "Jul 6, 1966 Bd. Members contacted—Postponement Denied. July 6, 1966 Letter to registrant's mother, cc to registrant."

The Exhibit, on page 128, shows there is more to this event than just the above two lines. There is a letter on page 128 showing that a "reopening of his classification" was also denied. The date of this letter is July 5, 1966!

Our point is not that this is government by the clerk; it may be that but, in addition it is clear enough that the board never met to consider the evidence; that they were "contacted." This justifies the conclusion it was a telephone call, a polling of the board. We assert that the board members should have had the evidence before them, not predigested (or even read) by a clerk. "Business" may operate in such a manner but the regulations of this agency require that a quorum be *present at a meeting.*

Our conclusion is buttressed by further inspection of the Minutes of Actions. In several instances where relatively innocuous decisions were made there is a vote entered. Here, on a crucial question, there was no vote.

Finally, since this is a criminal case the benefit of any doubt that may exist is due the defendant.

The observations of various courts on the principle involved may be of help.

In *Olvera* v. *United States,* 5 Cir., 1955, 223 F.2d 880, 882 the Fifth Circuit pointed out that—

> "The Supreme Court has, in a line of cases[3] starting in 1955, sought to reconcile the fundamental principles of liberty and due process with the failure of the Universal Military Training and Service Act (50 United States Code, App., Section 451 et seq.) to make specific provision for judicial review of board action and for a jury trial on the controlling issues of fact."

The court went on to state (p. 882):

> "This principle, that when every requirement of due process has been observed by the board, its fact decisions, unless wholly unsupported are not subject to review. . . . Under this principle, it is of the essence of the validity of board orders and of the crime of disobeying them that all procedural requirements be strictly and faithfully followed, and that a showing of failure to follow them with such strictness and fidelity will invalidate the order of the board and a conviction based thereon.
>
> "The reaction against and retreat from the rigors of the Falbo decision, that board orders on which conviction of crime and deprivation of liberty are based, convictions in effect by administrative fiat, are unreviewable, was to some extent begun in the earlier decisions. It remained however for these latest cases to bring the reaction almost full circle around by pointing out the essentiality to due process of the recognition of principle that if the deprivation of liberty is to be in effect accomplished by the action, in the stress and

pressure of a war effort, of administrative bodies of laymen, strict compliance with every procedural requirement is essential to the board's jurisdiction and the validity of its orders. . . ."

In *U. S.* v. *Adragna*, No. 26196, S.D. Calif., January 27, 1958, Judge Harry Westover decided this, and other, submitted cases, he had tried in the Fall of 1957. Counsel has a 12 page reporter's transcript of the January 27, 1958 proceedings.

In this *Adragna* case the same ("phony meeting") point was raised. There was some preliminary rehashing of other points involved and then the following took place:

"Now, Your Honor, my point is that that is no meeting. That is no reconsideration.

THE COURT: Is this the phone case?

MR. TIETZ: Yes, that is the phone case.

THE COURT: I will ask the United States Attorney, can you have a meeting of the board by phone and just asking them? They are supposed to consider the problem. They are not supposed to take the report of somebody over the phone, a hearsay report as to what is in the file, what is in the report.

* * *

THE COURT: I don't think some clerk can call up a local board and say so-and-so has filed a form and this is what it contains. I think the board should consider the evidence, not the statement of what the evidence is from somebody else."

He then found the defendant not guilty.

In *U. S.* v. *Nelson*, CR. No. 45202, E.D.N.Y. decided March 19, 1958, Byers, Ch. J., said:

"This defendant was tried to the court on February 27, 1958, a jury having been duly waived, on an indictment charging him with violating the Selective Service Act (Title 50 U.S.C. App. § 456 (j)) being the offense comprehended in § 462 (b) (6) of that statute."

* * *

"The only important argument made for the defendant is that his local board did not adequately consider his application for a reclassification, because it was not made the subject of a hearing before the board at which he could have an opportunity to be present and offer the testimony of witnesses concerning his alleged change of status within the hierarchy of his sect.

"It is undisputed that the unanimous vote of the local board denying the application, was the result of a canvass of all members taken over the telephone by the clerk of the board, who read to each member the defendant's letter dated August 11, 1957. Therein he asserted that he had been appointed a full-time Pioneer Minister on August 1, 1957 in consequence of which his former status as a part-time minister had been superceded, wherefore a reclassification was sought.

"This court is of the opinion that the taking of the vote over the telephone did not accord to the defendant the process contemplated by the Regulation 1604.56 which in material part reads:

> '* * * A majority of the members of the local board shall constitute a quorum for the transaction of business. A majority of the members present at any meeting at which a quorum is present shall decide any question or classification * * *.'

"Regulation 1625.1 specifies that no classification is permanent, and subsequent paragraphs deal with

the procedure involved in the various aspects of the matter.

"Regulation 1625.2 seems to cover the situation involved in this case.

"The local board was here confronted with the duty of examining into the subject of the registrant's actual vocation and his alleged avocation, with a view to reaching a decision based upon evidence. That function could not be, and was not adequately discharged in the manner here employed.

See *U. S.* v. *Diercks,* 223 F. 2d 12;
U. S. v. *Ransom,* 223 F. 2d 15."

CONCLUSION

For the reasons above stated, the judgment of the district court should be reversed and an order entered directing the district court to render and enter a judgment of acquittal.

Respectfully submitted,

J. B. TIETZ
Attorney for Appellant

February 19, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ
Attorney for Appellant

APPENDIX

Plaintiff's Exhibits:	For Identification	In Evidence
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APPELLEE'S BRIEF

APPEAL FROM
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FOR THE CENTRAL DISTRICT OF CALIFORNIA

FILED

MAR 15 1968

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

The appellant, Thomas Jerry Yeater, was indicted on April 26, 1967. The indictment was brought under Title 50, United States Code, Appendix §462 and charged that the appellant failed and refused to be inducted into the armed forces of the United States as so notified and ordered to do [C.T. 2]. 1/ On May 22, 1967, appellant pleaded not guilty. The case proceeded to trial before the Honorable Irving Hill on June 27, 1967, trial by jury having been waived. Appellant was

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1/ "C. T." refers to Clerk's Transcript of Proceedings.

found guilty and sentenced on July 24, 1967 to three years imprisonment [C. T. 4].

Appellant's Notice of Appeal was timely filed on July 26, 1967 [C. T. 5].

The jurisdiction of the District Court was based upon Title 50 U. S. C. App. §462, Title 18 U. S. C. §3231 and Rule 18 of the Federal Rules of Criminal Procedure. This Court has jurisdiction to review the judgment of the District Court pursuant to Title 28 U. S. C. §§ 1291 and 1294 and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTE INVOLVED

Title 50 U. S. C. App. §462, provides in pertinent part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the

execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both. . . ."

III

QUESTIONS PRESENTED

A. Is Judicial Review of Appellant's Classification Possible Where Administrative Remedies Have Not Been Exhausted?

B. Was Appellant Denied Due Process By the Failure of the Local Board to Reopen His Classification After He Had Been Ordered to Report for Induction?

IV

STATEMENT OF FACTS

At the time of the trial of this case a photographic copy of the Official Selective Service File of appellant was offered and admitted in evidence as Government's Exhibit No. 1 [R. T. 25, lines 22-23]. 2/ This copy had attached to it a certificate by Captain T. D. Proffitt, U. S. A. F. (Ret.), District Coordinator, Selective

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2/ "R. T." refers to Reporter's Transcript of Record.

Service System, that it was a full, true and correct copy of the original file of which he had legal custody. Also attached was a certificate and seal of the Staff Secretary, Headquarters, Southern Area, Selective Service System, to the effect that Captain Proffitt was the District Coordinator and had custody of the original selective service file of the appellant.

This file revealed the following events with respect to appellant's registration status in the Selective Service System:

On June 30, 1958 appellant registered at Local Board No. 100, Los Angeles, California [pp. 1-3]. 3/ On May 1, 1959 the Local Board mailed him a classification questionnaire which he completed and returned to the Board on May 5, 1959 [pp. 5-11]. In Series 6 of this form, appellant stated that he was not a minister. He did not sign the conscientious objector claim in Series 7, which instructs the registrant to sign if he claims to be a conscientious objector and tells him not to sign unless he claims exemption as a conscientious objector [p. 7]. Appellant also left blank Series 8 of the questionnaire requesting the names of any dependents who are wholly or partially dependent upon him for support [p. 7].

On August 17, 1961 appellant was classified 1-A and on August 21, 1961 he was mailed notice of that classification [p. 12]. Appellant did not appeal from this classification. On March 11, 1963 the Local Board mailed him an order to report for armed forces physical examination on April 5, 1963 [p. 23]. Appellant was

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3/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

examined on the latter date and found fully acceptable for induction [p. 24].

On September 10, 1963 the Local Board mailed appellant an order to report for induction on September 30, 1963 [p. 28]. On September 17, 1963 he appeared at the Local Board office and handed the Board a written request for a Form 150 for conscientious objectors [pp. 12, 29]. Appellant stated that the request was made "due to the fact that I am one of Jehovah's Witnesses and cannot accept military duty." He further said, "I did not report this information sooner as I assumed this would be taken up at examination for induction." [p. 29]. The Local Board handed appellant a Form 150 on September 17, 1963 which he completed and returned on September 23, 1963 [pp. 12, 34]. Upon receiving appellant's Form 150, the Local Board requested permission to postpone and reopen his case for the purpose of evaluating his claim [p. 31]. This permission was given [p. 41]. His induction was postponed until further notice [p. 32]. On October 28, 1963 the Local Board scheduled an interview with the appellant [p. 42]. Appellant appeared at the interview after which the Board decided that he was not a conscientious objector and classified him 1-A [pp. 12, 43-44]. Appellant did not appeal from this classification.

On November 19, 1963 the Local Board mailed appellant an order to report for induction on December 9, 1963 [p. 45]. On December 5, 1963 the Local Board received a handwritten letter addressed to the Los Angeles Examining and Induction Station from appellant's mother in which it stated in part: "I need him home. He

has been paying the rent of $90 a month for us as my husband has been in and out of the hospital since last July and is not able to work, so the only income is his pension. I am also under the doctor's care with peptic ulcers. I don't understand the reason for taxpayers to support these men when they have means of taking care of there (sic) family." [pp. 46-47]. Also on December 5, 1963 appellant's mother telephoned the Local Board and in response to that phone call the Local Board sent appellant a dependency questionnaire to be completed by him [pp. 50-51]. On December 6, 1963 appellant telephoned the Board and requested the postponement to permit consideration of his mother's dependency status [p. 52]. The Local Board thereafter requested postponement of appellant's induction [p. 53]. His induction was postponed [p. 54].

On December 31, 1963 the Local Board received a dependency questionnaire completed by appellant [pp. 57-60]. On this form appellant indicated that he was working as an appliance repairman but did not disclose his salary or wages or his income as requested [p. 57]. In Series 3 of the form, appellant indicated that he contributed $140 per month to the support of his mother [p. 58]. Appellant's mother signed a statement that he "pays rent, utilities, and helps with my medicine." [p. 60]. On January 8, 1964 the Local Board classified appellant 3-A and on January 16, 1964 he was mailed notice of this classification [p. 13].

On January 28, 1965 the Local Board mailed appellant another dependency questionnaire which he returned on February 8, 1965 together with a handwritten letter [pp. 64-70]. In this letter

appellant stated that he was laid off from his job in April of 1964 and was injured in May of that year and therefore "I'm not able to support anyone." [p. 65]. On March 9, 1965 the Local Board requested that appellant have his physician provide the Local Board with a letter verifying his injury [p. 71]. On April 22, 1965 the Local Board wrote appellant's treating physician but received no reply and requested appellant to contact the doctor and obtain a letter from him [pp. 77-78]. No letter from the physician was forthcoming, and on June 22, 1965 the Local Board mailed appellant an order to report for induction on July 13, 1965 [p. 82]. On June 30, 1965 appellant wrote the Board asking for postponement of his induction and gave details of his injury [pp. 84-85]. On July 1, 1965 appellant's induction was postponed [p. 86].

On July 23, 1965 the Local Board mailed appellant an Order to Report for Armed Forces Physical Examination on August 18, 1965 [p. 88]. Appellant reported and subsequently was notified that he had been temporarily rejected but that he should return for further examination on or about February 1966 [p. 89]. On October 5, 1965 appellant was classified 1-Y (qualified for military service only in time of war or national emergency) and on October 7, 1965 he was mailed notice of this classification [pp. 13, 90-91]. On January 25, 1966 the Local Board mailed him another order to report for Armed Forces Physical Examination on February 10, 1966 [p. 92]. Appellant reported for the examination and was found fully acceptable for induction [p. 93]. On March 31, 1966 appellant was classified 1-A and on April 5, 1966 he was mailed notice of this

classification [pp. 14, 96-97]. Appellant did not appeal from this classification.

On April 19, 1966 the Local Board mailed appellant an Order to Report for Induction on May 24, 1966 [p. 98]. This order was returned to the Local Board by the Post Office with the notation that appellant had moved and left no address [p. 99]. The Local Board thereafter wrote several letters attempting to locate appellant [pp. 100-105]. On May 13, 1966 the Local Board received a letter from appellant stating that he had received the Board's letter telling him to prepare for induction on May 24, 1966 [pp. 106-116]. In this letter appellant stated that he had flat feet [p. 111] and that his injured leg was one-half inch shorter than his other leg [p. 112]. Appellant did admit that about a week after he was classified 3-A in January 1964 he lost his job and was out of work [pp. 107-108]. Appellant further claimed that it would be a hardship on his mother for him to be inducted since his mother had acquired obligations which he would have to pay [p. 113]. On May 16, 1966 the Local Board postponed appellant's induction until further notice [p. 118].

On May 17, 1966 the Local Board mailed to the Armed Forces Examination and Entrance Station a copy of a letter from appellant's physician [p. 120]. The letter from appellant's physician stated: "I have seen and treated this young man because of pain in his right leg. Sometime ago he had a very severe fracture of the right leg which presently shows good healing of the tibia. He has however been left with a short right leg, the right leg measuring 35-3/4", the left measuring 36-1/4", and I have prescribed for

him a 3/16" general heel lift on the right. This injury occurred in 1964, and the patient was in a cast approximately seven months." [p. 133]. The Armed Forces Examination Station noted that despite the 1/2 inch shortness in his leg he remained acceptable for military service [pp. 120-121].

On June 21, 1966 the Local Board ordered appellant to report for induction on July 12, 1966. On June 27, 1966 the Local Board received a letter from appellant's mother stating that appellant pays $100 a month expenses on her behalf [p. 123]. On July 1, the Local Board reviewed appellant's file and decided that the facts presented by his mother did not warrant a postponement of his induction [pp. 14, 125]. On July 2, 1966 appellant's mother wrote another letter to the Local Board in which she mentioned that he was needed at home to pay $100 per month of her expenses and that he had flat feet and a leg 1/2 inch shorter than the other [p. 126]. On July 5, 1966 the Local Board notified appellant's mother that her letter had been received and the Board had decided that the facts contained therein did not warrant postponement of his induction or reopening of his classification [p. 128].

On July 12, 1966 appellant appeared at the induction station as ordered. His medical examination was brought up to date and he was given a physical inspection and an orthopedic consultation [pp. 130, 138]. Appellant had previously completed a report of medical history in which he claimed to have or have had swollen or painful joints, dizziness or fainting spells, ear, nose, or throat trouble, running ears, pain or pressure in chest, cramps in legs,

coughed up blood, frequent or painful urination, and foot trouble [p. 136]. During his examination appellant indicated that he was refusing to go into the armed services because of possible residual problems from his injured leg [pp. 130, 138]. During appellant's processing for induction he left the induction station and never returned [p. 130].

ARGUMENT

A. APPELLANT IS PRECLUDED FROM ARGUING THE IMPROPRIETY OF HIS CLASSIFICATION BY VIRTUE OF HIS FAILURE TO EXHAUST HIS ADMINISTRATIVE REMEDIES.

Appellant contends that there was no basis in fact for the denial by his Local Board of a draft deferment based on either (1) physical disability or (2) hardship [Appellant's Brief, p. 6].

It is a moot point. Appellant was classified 1-A on March 31, 1966 and was mailed a notice thereof on April 5, 1966. Appellant did not appeal from this classification, nor any prior 1-A classification [Ex. 1, pp. 12-15; R. T. 78, lines 2-7]. Subsequent to the mailing on May 9, 1966 of the Order to Report for Induction, appellant raised questions concerning his physical condition and his mother's financial dependency on him [Ex. 1, pp. 14, 15].

The general rule is that a selective service registrant who believes that he has been rendered subject to military service by an erroneous classification or arbitrary action of his local board

must exhaust all his administrative remedies before his claim may be heard in court.

United States v. Kauten, 133 F.2d 703
(2nd Cir. 1943);

Swaczyk v. United States, 156 F.2d 17
(1st Cir. 1946), cert. denied 329 U.S. 726;

Jeffries v. United States, 169 F.2d 86
(10th Cir. 1948);

Williams v. United States, 203 F.2d 85
(9th Cir. 1953), cert. denied 345 U.S. 1003;

Doty v. United States, 218 F.2d 93
(8th Cir. 1955);

United States v. Palmer, 223 F.2d 893
(3rd Cir. 1955), cert. denied 350 U.S. 873;

United States v. Nichols, 241 F.2d 1
(7th Cir. 1957).

Failure to appeal from his last classification by the local board will preclude a registrant from claiming such classification was improper.

Skinner v. United States, 215 F.2d 767
(9th Cir. 1954), cert. denied 348 U.S. 981;

Evans v. United States, 252 F.2d 509
(9th Cir. 1958);

Maddox v. United States, 264 F.2d 243
(6th Cir. 1959).

The selective service regulations expressly provide for

appeal by a registrant "if he files a written request therefor within ten days after the local board has mailed a notice of classification to him."

32 C.F.R. §1624.1(a).

The regulations further provide that "[i]f a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

32 C.F.R. §1641.2(b).

Therefore, in view of appellant's failure to appeal his 1-A classification he cannot now be heard to complain that such classification was without basis in fact.

B. APPELLANT IS PRECLUDED FROM ASSERTING DENIAL DUE PROCESS BY THE FAILURE OF THE LOCAL BOARD TO REOPEN HIS CLASSIFICATION AFTER HE HAD BEEN ORDERED TO REPORT FOR INDUCTION.

Appellant urges that the question of denial of due process was raised by the mere presentation in evidence of his Selective Service System file [Appellant's Brief, p. 5]. However, he cites no legal authority to uphold his unique theory. No such issue was raised in the trial court [R.T. 100, lines 13-17]. A reviewing court will not consider a constitutional question raised for the first time on appeal.

United States v. Miller, 316 F.2d 81, 83
(6th Cir. 1963), cert. denied 375 U.S. 935.

A court on appeal will only review rulings made by a trial court on questions brought to its attention and passed upon by it. Error cannot be predicated upon the reception of evidence with respect to which no challenge has been made in the trial court.

Ayers v. United States, 58 F.2d 607, 608
(8th Cir. 1932);
Lucas v. United States, 343 F.2d 1, 4
(8th Cir. 1965).

Even if the issue had been litigated at trial, appellant's contention could not be hpheld, as explained below.

Appellant claims that the local board illegally failed to reopen his classification. Appellant was classified 1-A on March 31, 1966, and on April 19, 1966 was ordered to report for induction on May 24, 1966. This date was subsequently postponed to July 12, 1966 [Ex. 1, pp. 14, 122]. Letters from appellant's mother claiming financial dependence on her son were received on June 27, 1966 and July 5, 1966 [Ex. 1, pp. 14, 15, 123, 126], approximately three months after he had been classified 1-A.

The law is clear on the point in issue. The Board may determine whether to reopen and reclassify on its own motion unless an order to report for induction has been issued. After the issuance of such an order the local board cannot reopen "unless [it] first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no

control."

32 C.F.R. §1625.2.

This issue was considered recently in Davis v. United States, 374 F.2d 1, 4 (5th Cir. 1967) where the court stated:

> "The pertinent regulation categorically declares that the classification of a registrant shall not be re-opened after an order to report for induction has been mailed unless there is a specific finding by the local board of 'a change in the registrant's status resulting from circumstances over which the registrant had no control' . . . . The Board found no such change of status. The validity of this regulation (1625.2) has been consistently upheld." (Citations omitted).

Cases where a claimed change of status is made before the induction notice is mailed must be distinguished. This was the situation in Olvera v. United States, 223 F.2d 880 (5th Cir. 1955), cited by appellant [Appellant's Brief, p. 9]. There, a claim of change of status was made before the induction notice was mailed and when the defendant first registered.

The foregoing authorities clearly indicate that a registrant's classification will not be reopened after he has been ordered to report for induction unless the board specifically finds a change in circumstances over which the registrant had no control. In the case at bar no such finding was made [Ex. 1, p. 125]. The phrase "circumstances over which the registrant had no control" implies a

sudden event - something that has not arisen before. There is no evidence in the file that appellant's mother became "suddenly" financially dependent on him. In fact the evidence points to a contrary conclusion since this question of a dependency deferment on a hardship basis for appellant was first considered by the board and granted on January 8, 1964 [Ex. 1, p. 13], and was again brought to the board's attention by appellant's letter dated May 11, 1968 [Ex. 1, pp. 106-116].

The board reviewed appellant's file and denied a postponement of induction on July 1, 1966 after receiving a letter from appellant's mother on June 27, 1966, wherein she claimed financial dependence on him [Ex. 1, pp. 123, 125]. Note that the Board did reconsider appellant's classification, in accordance with 32 C. F. R. §1625.2, but found no change of status warranted. Appellant's brief makes no mention of this fact. Another letter from appellant's mother was received on July 5, 1966 [pp. 126, 127] reiterating her financial dependence on the appellant. The board again denied a postponement of induction on the same day [p. 128]. Appellant points to this particular denial as error [Appellant's Brief, p. 8] claiming that appellant's classification should have been reopened. In fact, as explained above, the board did reconsider appellant's classification when his mother's first letter was received.

> "This is not a case where the registrant had presented new facts to the board for the first time in support of his prayer for reopening . . . . We hold that a local board does not act arbitrarily and unreasonably in

refusing to consider a claim of exempt status by a conscientious objector when the same claim has previously been considered and rejected and the registrant has not invoked the administrative remedies which would have brought about a thorough investigation and hearing of all aspects of his claim." [Emphasis added]

Woo v. United States, 350 F.2d 992, 995 (9th Cir. 1965).

While the claim in question in Woo was conscientious objection and not hardship, as here, the logic is quite applicable to this situation.

A review of appellant's selective service file indicates an almost frantic last minute attempt to avoid induction. Appellant's reaction on this occasion appears to have been largely a duplication of a past effort, in that on September 17, 1963, after being ordered to report for induction on September 30, 1963, he appeared before his local board and requested a conscientious objector form. Classification as a conscientious objector was subsequently denied and appellant again ordered to report for induction on December 9, 1963. Appellant then requested a dependency deferment and this was granted. "Simply by refusing or neglecting to invoke the administrative machinery for thorough investigation, such a registrant could always create a one-sided record before the board which would enable him to require reconsideration whenever induction became imminent." Such conduct would create a shambles of this area of selective service classification.

Woo v. United States, supra, at 995, 996.

In view of these events, it is difficult to comprehend how appellant can claim that "new facts" were presented to the board on July 5, 1966 so as to make a "prima facie case for a new classification", within the purview of Miller v. United States, 9th Cir., December 29, 1967, No. 21,417. It is equally incredulous that appellant can allude to a foreclosure of his administrative rights when he never appealed any of his 1-A classifications [Appellant's brief, p. 12a].

One remaining point must be considered. Appellant makes a strong and serious implication of a "phony meeting" by the local board, in connection with the above-discussed issue of the reopening of his classification [Appellant's Brief, p. 10]. In a case where the board has refused to reopen a registrant's classification, " . . . the local board by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required." 32 C.F.R. §1625.4 (Emphasis added).

Since §1625.2 of the Selective Service regulations is silent as to what action a board must take following a finding of no change in registrant's status resulting from circumstances beyond his control, after an Order to Report for Induction has been mailed, it is logical to read §1625.4 in conjunction with it, since the latter section deals generally with a refusal to reopen and reconsider a registrant's reclassification.

The purport of the regulations when read together is that members are not required to be present at a meeting of the board to specially consider the question of reclassification when no new facts arising from circumstances over which the registrant had no control which would justify a change in status have been adduced, as here. The board in this instance went beyond its record-keeping requirements: it recorded its decision in the minutes, while the only requirement was to place a copy of the letter to the registrant in his file. No other record of the action taken was required. It follows that if no other record is required than no entry in the minutes is required. A fortiori, if no entry in the minutes is required then no board meeting, of which the minutes are a record, is required.

> "Each local board shall keep a record of each meeting of the board on Local Board Actions and Minutes (SSS Form No. 112) which shall be filed by the local board as minutes of its meetings."
>
> 32 C.F.R. §1604.58.

It is important to note that the board did review appellant's file in response to the first letter from his mother, received by the board on June 27, 1966 [Ex. 1, pp. 123, 125]. While the board's response to the second letter from his mother does not say that the file was again reviewed [Ex. 1, p. 128], to do so would be of no effect since appellant was urging the board to reconsider a matter it had just reviewed a few days previously. To require a board to

hold a meeting each time a registrant wrote a letter to it, where the information presented was non-cumulative in effect and had been previously considered, would be inconsistent with the goal of an orderly, efficient selective service system. A contrary conclusion would place an undue burden on local boards.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the decision of the trial court should be affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Arnold G. Regardie
ARNOLD G. REGARDIE

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S CLOSING BRIEF

FILED
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IN THE

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FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
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Appellee.

APPELLANT'S CLOSING BRIEF

Appellee argues "In view of these events, it is difficult to comprehend how appellant can claim that 'new facts' were presented to the board on July 5, 1966 so as to make a 'prima facie case for a new classification', within the purview of *Miller* v. *United States*, 9th Cir., December 29, 1967, No. 21,417." [Appellee's Br. p. 17]

The "events" appellee refers to are stated by it as follows: "A review of appellant's selective service file indicates an almost frantic last minute attempt to avoid induction." [p. 16]

To wait until one is in jeopardy is an almost universal characteristic, one that is especially prevalent in young men.

We believe truth, rather than time, is the test, excepting only that the time be timely. Timeliness has been construed to mean before induction. *Hull* v. *Stalter,* 7 Cir., 151 F.2d 633.

> "We see no reason why a registrant with a non-exempt status at the time of registration should not subsequently be permitted to show that his status has changed or, conversely, why one who is exempt at the time of registration should not afterwards be shown to be non-exempt. In fact, the latter situation seems to be contemplated by § 5(h) of the Act, which provides that 'no * * * exemption or deferment * * * shall continue after the cause therefor ceases to exist.' The point perhaps is better illustrated by referring to certain officials who are deferred from military service while holding office. Suppose a registrant who held no office at the time of his registration and was therefore liable for military service should subsequently be elected or appointed *judge* of a court or any other office mentioned in the Act. We suppose it would not be seriously contended but that he would be permitted to show his changed status *any time prior to his induction* into service and therefore be entitled to a deferment." [635, Emphasis supplied]

Appellee argues "It is equally incredulous that appellant can allude to a foreclosure of his administrative rights when he never appealed any of his I-A classifications".

That a registrant "never appealed his I-A classification" can be ascribed to the belief, correct no doubt, *that at the time each came* he had no basis for an appeal. That a registrant's status may change is a fact of life expressly recognized by the law. 32 C.F.R. § 1625.1 says: "Classification Not Permanent.—(a) No classification is permanent."

We argue that appellant was wronged at the time in 1966 he presented "new and further information." At that time he was deprived of the administrative procedures that could help him: the Appearance and the appeal. 32 C.F.R. § 1625.2.

> "1625.2 When Registrant's Classification May Be Reopened and Considered Anew.—The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification, or (b) upon its own motion if such action is based upon facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board *first specifically* finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Although the wording is permissive it is a gross abuse of discretion to fail to reopen. *Brown* v. *U. S.*, 9 Cir., 1954, 216 F.2d 258:

> "If a change of status was disclosed it was the *duty* of the board to take it into consideration and to classify him in the light of the new evidence presented.

United States ex rel. Hull v. Stalter, 7 Cir., 151 F.2d 633, 635; Knox v. United States, 9 Cir., 200 F.2d 398, 401; Dickinson vs. United States, supra, 346 U.S. p. 392, 74 S. Ct. 152; Jewell v. United States, 6 Cir., 208 F.2d 770, 771." [260]

CONCLUSION

For the reasons given the judgment should be reversed.

Respectfully,

J. B. TIETZ
410 Douglas Building
Los Angeles, California 90012
Attorney for Appellant

March 22, 1968.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. B. TIETZ, *Attorney*

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

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IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 22261

THOMAS JERRY YEATER,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR REHEARING

Comes now the appellant, by his attorney, and files this his Petition for Rehearing of Judgment entered by the Court on June 27, 1968, affirming the judgment of the court below.

Appellant reserves his argued position as to each of the points of appeal, but in this petition addresses himself solely to certain features of the decision wherein he believes the Court may be convinced its opinion should be reversed.

Appellant respectfully urges that the opinion overlooks a feature of the case, presented in oral argument,

namely, that the action of the board on May 16, 1966 [Ex. 118] postponing the Order to Report for Induction "until FURTHER NOTICE" gave appellant a new start, a rebirth, in his Selective Service System life.

During oral argument appellant cited *Hamilton* v. *Commanding Officer,* 9 Cir., 1964, 328 F.2d 799, 802 and gave the clerk the tip-in sheets for this citation. *Hamilton* shows that such a postponement is actually a cancellation.

Thus, appellant's prior failure to administratively appeal was immaterial.

Respectfully, appellant asserts (1) this born-anew posture requires reopening by the local board and (2) the board's neglect to reopen presents a plain, fundamental error involving appellate cognizance.

Counsel further represents and certifies: In counsel's judgment this Petition is well founded and is not interposed for delay.

J. B. Tietz
Attorney for Appellant

July 26, 1968.

NO. 22263

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR QUEVEDO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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FILED

JUN 10 1968

WM. B. LUCK, CLERK

NO. 22263

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR QUEVEDO,

Appellant,

vs.

UNITED STATES OF AMERICA,

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APPEAL FROM
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NO. 22263

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HECTOR QUEVEDO,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On September 14, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in three counts against appellant Hector Quevedo. This indictment was as follows: [C. T. 2] 1/

"Count One. On or about April 14, 1966, in Los Angeles County, California, within the Central Division

---

1/ C. T. refers to Clerk's Transcript herein.

of the Southern District of California, defendant HECTOR QUEVEDO, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 2,786.700 grams of marihuana, which said marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

"Count Two. On or about April 14, 1966, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HECTOR QUEVEDO, with intent to defraud the United States, knowingly sold to Agent David Westrate of the Federal Bureau of Narcotics and an undercover assistant of the Federal Bureau of Narcotics 2,786.700 grams of marihuana, which said marihuana, as the defendant then and there well knew, theretofore had been imported and brought into the United States contrary to law.

"Count Three. On or about April 14, 1966, in Los Angeles County, California, within the Central Division of the Southern District of California, defendant HECTOR QUEVEDO, knowingly and unlawfully transferred 2,786.700 grams of marihuana to Agent David Westrate of the Federal Bureau of Narcotics and an undercover assistant of the Federal Bureau of Narcotics without obtaining from either of them a written order on a form issued for that purpose by the Secretary of the Treasury

of the United States."

Pursuant to appellant's plea of not guilty, entered on September 19, 1966, trial by jury was set for October 17, 1966. On the latter date, trial was continued to November 7, 1966. Appellant waived his right to trial by jury and trial commenced on November 8, 1966, before the Honorable Albert Lee Stephens, Jr.

On November 9, 1966, the court found appellant guilty on all counts of the indictment [R.T. 176]. 2/

On December 5, 1966, appellant was sentenced to serve a term of five years imprisonment on Counts One, Two and Three of the indictment, said term to run concurrently on all three counts. [C.T. 50].

A timely notice of appeal was filed on December 8, 1966 [C.T. 51].

Jurisdiction of the District Court was based on Title 21, United States Code, Section 176a, and on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based on Title 28, United States Code, Sections 1291 and 1294(1).

II

STATUTES INVOLVED

Title 21, United States Code, Section 176a reads as follows:

2/ R.T. refers to Reporter's Transcript herein.

"Notwithstanding any other provision of law, whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned for not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

"Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury.

"As used in this section, the term 'marihuana' has the meaning given to such term by section 4761 of the Internal Revenue Code of 1954."

Title 26, United States Code, Section 4742(a) reads as follows:

> "It shall be unlawful for any person, whether or not required to pay a special tax and register under sections 4751 to 4753, inclusive, to transfer marihuana, except in pursuance of a written order of the person to whom such marihuana is transferred, on a form to be issued in blank for that purpose by the Secretary or his delegate."

III

QUESTIONS PRESENTED

Is the evidence sufficient to sustain the Court's finding that no entrapment of appellant occurred?

IV

STATEMENT OF THE FACTS

Both Lonnie Van de Ford and Don Schutz were, during April 1966 and for a few months prior thereto, working with the Federal Bureau of Narcotics as special employees, i.e., as undercover assistants [R.T. 40, 73-74]. Both were, at the time of trial below, facing federal charges for the illegal transportation of marihuana [R.T. 40, 73]. Both participated in the negotiations with appellant for the purchase from appellant, on behalf of the Federal Bureau of Narcotics, of the marihuana described in the

indictment herein. That purchase was consummated on the night of April 14, 1966.

Van de Ford and Schutz had been aware of appellant's identity for several years [R. T. 42, 75]. Schutz in particular had telephoned appellant and visited his residence on several occasions during a period of several months prior to April 14, 1966, and, although he did not ask appellant to sell him marihuana during that period, he was aware that appellant was selling marihuana to other persons [R. T. 85]. Van de Ford first met appellant in April of 1966, at the apartment of two personal friends of appellant named Bunny and Bones, a male and a female, at 7114 Ethel Street in the San Fernando Valley [R. T. 44]. Prior to April 14, 1966, Van de Ford saw appellant bring two kilograms of marihuana to Bunny and Bones' apartment [R. T. 44].

At the trial below, appellant took the stand and testified that prior to April 14, 1966, probably in March, he had sold a kilogram of marihuana to one Larry Brittenham [R. T. 144-145]. Appellant's source of supply was one Darrel Williams, and he had been buying from Williams for a year or two prior to April, 1966 [R. T. 145]. Appellant also sold a kilogram of marihuana to Bunny and Bones prior to April 14, 1966 [R. T. 146]. Prior to April 14, 1966, appellant had sold a total of about ten kilograms of marihuana to Brittenham, according to Brittenham's testimony at trial [R. T. 108-109].

The first time when Van de Ford and Schutz asked appellant to get some marihuana for them was on April 12, 1966 [R. T. 148].

On that evening Van de Ford introduced appellant to Agent David Westrate of the Federal Bureau of Narcotis; the meeting took place at Bunny and Bones' apartment at 7114 Ethel [R. T. 18, 46]. At that time Westrate, in the presence of Van de Ford, had a discussion with appellant about marihuana; appellant told Westrate that he could furnish marihuana to Westrate in kilogram quantities [R. T. 19]. However, appellant said he would be unable to secure any marihuana on that evening [R. T. 19].

On the evening of April 14, 1966, Westrate and Van de Ford, together with Charles Walker, another agent, again went to Bunny and Bones' apartment [R. T. 21] but failed to find appellant there. They telephoned appellant [R. T. 23] and held a conversation with appellant regarding the purchase of marihuana; appellant advised them that he was prepared to sell three kilograms of marihuana to Westrate and the informants and that he would meet Westrate and the others at the apartment in one half hour [R. T. 24]. Appellant arrived at the apartment and asked for $300 to pay for the marihuana [R. T. 25]; he told Westrate that he would get in touch with him at the Laurel Room, a bar in North Hollywood, later that night; apellant then departed [R. T. 26]. Then Westrate, Walker and Van de Ford together with Schutz, who had since arrived, left the apartment and went to the Laurel Room [R. T. 27]; these four sat at a table in the Laurel Room from early in the evening until 11:30 or 11:45 P. M. [R. T. 28]. At that time, Schutz left the bar, having seen appellant drive up outside [R. T. 28]. Schutz then met with appellant outside the bar and drove away in

his own car, following appellant back to the apartment [R. T. 80, 81]. There appellant delivered to Schutz a sack containing three kilograms of marihuana [R. T. 81]. Schutz then left the scene, drove a few blocks and met with Westrate and Van de Ford [R. T. 82]; Schutz delivered to the agents the marihuana which he had purchased from appellant [R. T. 83] and which was admitted into evidence at the trial.

V

ARGUMENT

The sole issue on this appeal, as framed by appellant's brief, is whether the evidence at trial supports the judgment of conviction with respect to the issue of entrapment which was raised. Appellant concedes, at page 5 of his brief, that entrapment as a defense can have been established here only if the evidence shows that appellant was induced to sell marihuana by governmental conduct which was shocking or offensive per se. Specifically, appellant contends that the activities of special employees Schutz and Van de Ford in ingratiating themselves with appellant for the purpose of making purchases of marihuana from him was conduct which should not be tolerated in a free society.

Decisions of the Ninth Circuit support the propriety of the activities of the government informers here. By appellant's own testimony, it is clear that he was "ready and willing to

commit the offense whenever the opportunity was offered. . . ."

Notaro v. United States, 363 F. 2d 169 at 175
(9th Cir. 1966);

See also, Hill v. United States, 261 F. 2d 483
(9th Cir. 1958).

Appellant himself testified that, prior to April 14, 1966, he had sold marihuana in kilogram quantities both to Larry Brittenham and to Bunny and Bones [R. T. 144-146]. The informant, Don Schutz, knew appellant as a seller of marihuana [R. T. 85]. Most important, appellant testified that neither Schutz nor Van de Ford nor any government agent asked him to sell marihuana prior to April 12, 1966 [R. T. 148]. Thus only two days elapsed between the first broaching of the subject and the sale by appellant as charged in the indictment. This case is thus not comparable to Sherman v. United States, 356 U. S. 369 (1956), wherein the Supreme Court held that entrapment existed as a matter of law. In Sherman the informer, representing himself as a narcotics addict, implored the defendant repeatedly to obtain narcotics for him in order to alleviate his suffering. No such implorings were necessary in order to persuade appellant Quevedo to sell marihuana; the evidence is clear that he was ready and willing to sell to Agent Westrate, who had been vouched for by Schutz and Van de Ford, just as he had previously sold to Brittenham and Bunny and Bones.

But appellant contends that he would not have sold to Westrate if Schutz and Van de Ford had not ingratiated themselves

as his friends, since appellant sold marihuana only to his friends, and that creating a friendship for the purpose of buying marihuana on behalf of the Government is a practice which should not be tolerated in a civilized society. In other words, appellant argues that he was willing to sell marihuana only to bona fide friends; Schutz and Van de Ford were not such friends; therefore appellant was not ready and willing to sell to them, and he was entrapped. This argument is without support in decided cases. If it were accepted by this Court, no prosecution for sale of marihuana or narcotics based on undercover negotiations could ever succeed, for every such sale is based upon the mistaken assumption that it is being made to a "friend" of the seller. It is submitted that to state appellant's argument is to refute it, and that the activities of the informants here were perfectly proper police practices. As the Supreme Court stated in Sherman v. United States, supra:

> ". . . the fact that government agents 'merely afford opportunities or facilities for the commission of the offense does not' constitute entrapment. Entrapment occurs only when the criminal conduct was 'the product of the creative activity of law-enforcement officials." (356 U.S. at 372).

The use of special employees and government agents posing as go-betweens is clearly permissible.

Masciale v. United States, 356 U.S. 386 (1958)

It needs to be pointed out that neither Schutz nor Van de Ford

nor appellant himself ever stated at trial that there existed between appellant and either informant a close friendship which had been manufactured for the purpose of making purchases of marihuana. Such a friendship is solely an importation of appellant's brief. In fact Van de Ford testified [R. T. 63] that although he had seen appellant around the North Hollywood area prior to April 1966, it was only in April, not more than two weeks prior to the sale, that he became personally acquainted with appellant, and appellant confirmed this [R. T. 147-148]. The conclusion is inescapable that appellant was ready and willing to sell to anyone whom he considered a "safe" buyer.

Contrary to appellant's contention, the case of United States v. Whiting, 321 F. 2d 72 (1st Cir. 1963) does not support his position in this regard. Indeed, in that case the Court stated:

> ". . . . we hold that it is not per se offensive conduct for the government to initiate inducement without a showing of probable cause."

And:

> "If the type of identity misrepresentation made in this case is to be outlawed generally the whole structure of law enforcement involving government decoys must collapse." (321 U.S. at 77).

Just so in the present case: if the efforts of Schutz and Van de Ford to ingratiate themselves with appellant are to be found shocking and offensive per se, when by appellant's own admission there was evidence that the informants knew that appellant had

previously sold marihuana (Appellant's Brief, page 5), then the entire Government system of purchasing marihuana and narcotics through undercover activities designed to lull the seller will be destroyed.

CONCLUSION

For the reasons stated above, the judgment of conviction should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael Heuer
MICHAEL HEUER